In the Supreme Court

OF THE

United States

OCTOBER TERM, 1951

No. 280

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION and INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 16,

Petitioners,

vs.

JUNEAU SPRUCE CORPORATION (a corporation),

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONERS.

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OPINIONS BELOW.

The opinion of the District Court for the Territory of Alaska, rendered in ruling upon demurrers and motions of petitioners, is reported at 83 F. Supp. 224. The opinion of the Court of Appeals (R. 1106) is reported at 189 F. (2d) 177.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 5, 1951. (R. 1144.) The order of the Court of Appeals denying petitioners' timely petition for rehearing was entered on June 8, 1951. (R. 1145.) The petition for writ of certiorari was filed on August 27, 1951, and was granted on October 22, 1951. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED.

This case involves what are commonly known as the "jurisdictional dispute" sections of the Labor Management Relations Act, 1947, often referred to as the Taft-Hartley Act, 61 Stat. 136, 29 USC (Supp. III) § 161, et seq.[1]

Section 8(b)(4)(D) of the National Labor Relations Act, as amended, 29 USC (Supp. III) § 158(b)(4)(D), and Section 303(a)(4) of the Labor Management Relations Act, 1947, 29 USC (Supp. III) § 187(a)(4), contain virtually identical provisions. For ease of reference and comparison, their language is set forth below in parallel columns, with the identical language in each section italicized.

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[1]The Labor Management Relations Act, 1947, will sometimes be referred to herein as the "Act". Title 1 thereof, which is the National Labor Relations Act, as amended, will sometimes be referred to herein as the "Labor Relations Act".

Section 8(b)(4)(D).

"SEC. 8. • • •

"(b) It shall be an unfair labor practice for a labor organization or its agents • • •

"(4) *to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is* • • •

"(D) *forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work* • • •"

Section 303(a)(4).

"SEC. 303. • • •

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization *to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is* • • •

"(4) *forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the* National Labor Relations *Board determining the bargaining representative for employees performing such work* • • •"

Section 10(k) of the National Labor Relations Act, as amended, 29 USC (Supp. III) § 160(k), under which the National Labor Relations Board (hereafter called the Board) determines which employees in a jurisdictional dispute are entitled to particular work, provides as follows:

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

Section 303(b) of the Labor Management Relations Act, 1947, 29 USC (Supp. III) § 187(b), provides as follows:

"Sec. 303 * * *

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof[2] without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall

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[2]The relevant limitations and provisions of Sec. 301 read as follows:

"Section 301.

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and

recover the damages by him sustained and the cost of the suit."

QUESTIONS PRESENTED.

(1) Whether activities of a labor organization for the object defined by Section 303(a)(4) of the Act[3] are illegal and hence actionable under that section, unless they occur after and in the face of a determination by the National Labor Relations Board, under Section 10(k) of the Labor Relations Act, that the employees represented by such labor organization are not entitled to the work in question.

(2) Whether the provisions of Section 8(b)(4)(D) of the Labor Relations Act and Section 303(a)(4) of

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against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

"(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

"(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

[3] "* * * forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work."

the Act each proscribe the same conduct on the part of labor organizations; conversely, whether conduct which is not a violation of Section 8(b)(4)(D) of the Labor Relations Act is nevertheless illegal and actionable under Section 303(a)(4) of the Act.

(3) Whether the District Court for the Territory of Alaska is a district court of the United States within the meaning of Section 303(b) of the Act.

(4) Whether the breach by a party seeking damages in an action under Section 303(a)(4) of the Act of that party's duties under the Act may constitute a defense to the action, or be considered in mitigation of damages.

STATEMENT OF THE CASE.

Respondent Juneau Spruce Corporation, plaintiff below, sued the International Longshoremen's and Warehousemen's Union (hereafter called the "International") and International Longshoremen's and Warehousemen's Union, Local 16 (hereafter called "Local 16"), unincorporated trade unions, in the District Court for the Territory of Alaska for one million twenty-five thousand dollars ($1,025,000) in damages, basing its alleged cause of action on the provisions of Sections 303(a)(4) and 303(b) of the Taft-Hartley Act.

The events out of which the alleged cause of action arose may be briefly summarized as follows:

The respondent came into existence as a corporation and began its lumber manufacturing operations

in the spring of 1947, when it acquired the business of Juneau Lumber Mills, Inc. By contract with the latter corporation, the respondent purchased a sawmill and planing mill at Juneau, Alaska, logging equipment at Edna Bay, Alaska, retail yards at Juneau, Anchorage and Fairbanks, Alaska, together with all equipment used in those operations. (R. 113-118.) The operations of the respondent began on May 2, 1947, with the mill employees in Juneau consisting of those formerly employed by Juneau Lumber Mills, Inc. (R. 123, 228.)

At the time of the take-over, the respondent's predecessor was a party to a collective bargaining agreement with Local 16, whereby it had agreed to hire, and was hiring, longshoremen represented by that labor organization to perform all longshore work in connection with its operations. (Def. Exh. C, R. 655; R. 918-919.) In practice, the work performed under that contract consisted of the loading of lumber aboard the tugs or boats of purchasers at the company's docks in Juneau. (R. 170-171, 232.) For this work the longshoremen were paid by the respondent's predecessor. Lumber which was shipped by commercial steamer was also loaded aboard ship by longshoremen represented by Local 16, who in those instances were employed directly by the steamship companies. (R. 155.)

These kinds of shipment accounted for but a small proportion of the predecessor's production at the time of the take-over, the greater proportion of production at that time going to the United States Army Engi-

neers, which used its own personnel to pick up its lumber at the company dock. (R. 154-155, 183.) Until September, 1947, the situation with respect to the disposition of production remained the same for respondent as it had for its predecesor. Although respondent had not assumed its predecessor's collective bargaining agreement with Local 16 (R. 117), it continued to use longshoremen for the work covered under that agreement (R. 174-175, 933); the bulk of its production continued to go to the Army Engineers.

In September, 1947, respondent's contract with the Army Engineers was cancelled. (R. 183.) In anticipation of this, and of the necessity for it to dispose of most of its lumber elsewhere, the respondent had leased sea-going barges, to be used in shipping the bulk of its lumber to the United States. (R. 187.) That portion which the respondent had theretofore been shipping to the United States had gone by commercial steamer (R. 157), following the practice of respondent's predecessor, which had never employed its own sea-going barges for that purpose. (R. 982.)

In October, 1947, instead of using longshoremen for the work, the respondent employed its mill employees to place the first load of lumber on this sea-going barge. (R. 185-187.) These employees had never before loaded lumber aboard sea-going craft for shipment to the United States. (R. 982.) Immediately after the barge was loaded (R. 185), a committee of Local 16 visited the respondent, to request that the longshoremen it represented be given the barge-loading work. (R. 188.) The respondent rejected this request. (R.

189.) A second barge was loaded in the same manner in March, 1948.[4] (R. 202.) Promptly thereafter a delegation from Local 16 appeared before a membership meeting of the International Woodworkers of America, Local M-271 (hereafter called "Local M-271"), which represented the mill employees under a collective bargaining agreement with the respondent. Their position that longshoremen, rather than the mill employees whom Local M-271 represented, were entitled to perform the work of loading the sea-going barges was explained to those in attendance. (R. 832-836.) After the longshoremen's delegation had left, the Local M-271 meeting voted unanimously as follows:

> "Motion moved and seconded to go on record to not load barges. We figure this work belongs to the longshoremen." (Def. Exh. A, R. 467-472; R. 838-839.)

Within the following week, a delegation consisting of representatives of Local M-271 and Local 16 informed Eugene S. Hawkins, Vice-President and General Manager of respondent, that Local M-271 had agreed that the work of loading the barges belonged to the longshoremen. Hawkins was further informed that the members of Local M-271 would honor the picket line which Local 16 intended to place before respondent's mill if the latter persisted in its refusal to permit longshoremen represented by Local 16 to perform the work of loading the barges. (R. 203-206.) Even though the company's cost of operations would

[4] Such a diversion of work from the Juneau longshoremen caused a reduction of one-third in their income. (R. 621.)

not have been materially affected by acceding to the joint request of the two locals (R. 252-253, 256-275, 266), and the respondent had earlier informed the longshoremen that it would accept such an agreement between them (R. 182), the respondent insisted that the work be done by Local M-271. (R. 261.)

A day or two later, on April 9, 1948, Local M-271 called a meeting which was attended by the overwhelming majority of the mill employees (R. 383, 404, 840), again to discuss the question of the longshoremen's right to perform the barge-loading work and Local M-271's position with respect to the impending picket line. The minutes of the previous meeting recognizing the longshoremen's right to perform the work were read and approved and a general discussion ensued. (R. 841.) Those in attendance resolved unanimously to honor Local 16's picket line if it was established. The official minutes of the meeting read as follows:

> "Special meeting, April 9, 1948. Discussion on Conditions Relative to ILWU loading barges. Move made and seconded to take vote on whether to cross picket line—again a unanimous vote to honor picket line of ILWU." (Def. Exh. A, R. 467-472; R. 842.)

The following morning Local 16 established a peaceful picket line at the respondent's mill, and the mill employees honored it in accordance with their resolution passed the previous evening. (R. 843.)

On April 10, 1948, the respondent filed an unfair labor practice charge (the disposition of which is

discussed hereafter) with the National Labor Relations Board, alleging that Local 16 was violating Section 8(b)(4)(D) of the Labor Relations Act. From April 10 to July 19, 1948, respondent's mill was closed. (R. 310.) During that entire period the respondent refused to negotiate with the unions concerning a settlement of the dispute on terms agreeable to both unions. (R. 781, 891, 991, 1027.) On the contrary, it insisted that Local M-271 perform the work of barge-loading, although that organization continued to maintain that the longshoremen represented by Local 16 were entitled to the work. (R. 323-325.) In May (R. 453) respondent telephoned from its office in Portland to the President of Local M-271 and asked him to come to that city to see the officers and counsel for his International union. Respondent paid the expenses of the trip. (R. 534-535.) After the return of its President from Portland, Local M-271 entered into an agreement with respondent in which that Local agreed:

> "* * * to cross the picket line established by Local 16, ILWU, and claim jurisdiction of all work performed by employees of the Juneau Spruce Corporation according to our contract, also the loading of company-owned or leased barges with company-owned gear * * *" (Pl. Exh. 7, R. 462.)

The agreement was followed by the resumption of operations on July 19, 1948, although the peaceful picketing of Local 16 continued. (R. 439-440.) Thereafter, another barge was loaded with lumber by mill employees and was shipped from the mill at Juneau

to Prince Rupert, British Columbia, on August 27, 1948. The longshoremen at that port refused to unload the barge because of the existence of the dispute between Local 16 and the respondent. (Pl. Exh. 12, R. 617; R. 619.) The barge was rerouted to Tacoma, Washington, where it was unloaded. (R. 687, 788.) On October 11, 1948, the manufacturing operations at the mill ceased again, through the lack of storage capacity at respondent's mill caused by its inability to have its lumber unloaded at Puget Sound ports. (R. 440, 692-696.) It remained closed until the trial of the action began on April 27, 1949. (R. 411.)

The unfair labor practice charge which the respondent had filed on April 10, 1948, was investigated by the Regional Director of the 19th Region of the Board and dismissed by him, on the ground that his investigation showed insufficient evidence of violation to warrant further proceedings. This dismissal was appealed by the respondent, and upheld by the Acting General Counsel of the Board on August 4, 1948.[5] A new charge alleging a violation by Local 16 of Section 8(b)(4)(D), based on the resumption of work by the mill employees represented by Local M-271, was filed by the respondent on August 3, 1948. Pursuant to the provisions of Section 10(k) of the Labor Relations Act, the Board directed a hearing on the question of which employees were entitled to the disputed work. That hearing resulted in a Board determination on April 1, 1949, that the longshoremen represented by Local 16 were not entitled to the barge-

[5] *Juneau Spruce Corp.*, Case No. 19-CD-2 (unreported).

loading work.[6] On May 9, 1949, following this adverse determination by the Board, Local 16 discontinued its picketing.[7]

Respondent filed its complaint in the trial court against the International and Local 16 on October 19, 1948, claiming damages to that date for the picketing which had commenced on April 10 of that year. The trial court permitted respondent to file its second amended complaint on April 27, 1949, the opening day of the trial. (R. 28-29.) In this amended pleading, damages were sought for the picketing which had occurred between April 10, 1948, and April 27, 1949. (R. 6-7.) Neither in its original or amended complaints did the respondent allege, nor did it prove at the trial of the action, that the picketing of the petitioners of which it complained followed and occurred in the face of a determination of the Board under Section 10(k) that the employees represented by the petitioners were not entitled to the disputed work of barge-loading. The trial court did not conceive such non-compliance by petitioners with a determination by the Board under Section 10(k) to be an essential element of respondent's cause of action, and permitted the jury to assess damages against petitioners for the entire period from April 10, 1948, to April 27, 1949 (Instruction No. 5, R. 50-51), although all but twenty-seven days of this period preceded the Board's determination of the dispute under Section 10(k). Upon a jury verdict, judgment was en-

[6] *Juneau Spruce Corp.*, 82 NLRB 650.
[7] *Juneau Spruce Corp.*, 90 NLRB 1753, n. 5 at 1754.

tered against both petitioners in the sum of $750,000, plus costs and disbursements, including an attorney's fee of $10,000. (R. 73-74.) On appeal, a basic question which the Court of Appeals was called upon to decide was whether the picketing of Local 16 which preceded the Board's determination on April 1, 1949, that the longshoremen represented by Local 16 were not entitled to the disputed work, was actionable under Section 303(a)(4). Petitioners contended that Section 303(a)(4) rendered illegal and hence actionable only such picketing by a labor organization as took place after and in the face of a Board determination under Section 10(k) that the employees whom it represented were not entitled to the work in dispute. Petitioners asserted that the judgment of the trial court was fatally erroneous in having awarded damages for picketing which preceded the adverse award of the Board. The Court of Appeals rejected this position.

Before trial, by special appearance for the purpose of quashing the purported service of summons upon it (R. 7) and by demurrer (R. 15), the International challenged the jurisdiction of the trial court over its person. The trial court, conceiving itself to be a district court of the United States within the meaning of Section 303(b) of the Act (83 F. Supp. 224), denied the motion to quash and overruled the demurrer. (R. 21-22.) Jurisdiction over the person of the International, as well as the validity of the service upon it, was based on the alleged presence within the Territory of Alaska of an agent of the International, which

itself maintained no office or place of business therein. (R. 12,273.)[8] On appeal, such lack of jurisdiction by the trial court was asserted by the International, but was rejected by the Court of Appeals, which also held the trial court to be a district court of the United States, and hence warranted in basing its jurisdiction over the International on the provisions of Section 301 of the Act.

At the trial of the action, petitioners offered certain instructions which would have permitted the jury to consider the breach by respondent of its duties under the Act as a defense to the action or in mitigation of damages. (R. 34-36, 43-44; reprinted in the Appendix hereto, pp. i to iv.) These instructions were refused by the trial court, whose action in so doing was upheld by the Court of Appeals.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals for the Ninth Circuit erred:

(1) In holding that activities of a labor organization for the object defined by Section 303 of the Act are illegal and hence actionable under that Section, even though such activities precede a determination by the Board under Section 10(k) that the employees represented by such labor organization are not entitled to the work in question.

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[8] This holding was based upon the misconception that the provisions of Section 301 of the Act were here applicable. We will demonstrate below that they were not. This same misconception resulted in an erroneous holding that service upon the alleged agent was service upon the International.

(2) In holding the District Court for the Territory of Alaska to be a "district court of the United States" within the meaning of Section 303(b) of the Act, and thus approving the application by the trial court to the instant case of the rules concerning agency, jurisdiction, and service of process, which are laid down in Section 301 of the Act.

(3) In upholding the trial court's refusal to instruct the jury concerning the respondent's duties under the Act, which removed respondent's breach of such duties from the consideration of the jury as a defense to the action, or in mitigation of damages.

SUMMARY OF ARGUMENT.

I. Activities of a labor organization for the object defined by Sec. 303(a)(4) of the Act are not illegal and hence actionable under that section, unless they occur after and in the face of a determination by the National Labor Relations Board, under Sec. 10(k) of the Labor Relations Act, that the employees represented by such labor organization are not entitled to the work in question.

A. The provisions of Sec. 303(a)(4) of the Act, and Secs. 8(b)(4)(D) and 10(k) of the Labor Relations Act, are interrelated in such a manner as to make the meaning of the former Section dependent upon the construction of the latter two Sections taken together. The legislative history of Sec. 303 establishes this to be the case. That history shows that, by

including Sec. 303(a)(4) in Title III of the Act, Congress intended to make subject to an action for damages under that Section only such activities of labor organizations in connection with jurisdictional disputes as were made unfair labor practices by the provisions of the Labor Relations Act, which is Title I of the Act.

The activities of unions in jurisdictional disputes which are made an unfair labor practice in the Labor Relations Act are defined, not by the provisions of Sec. 8(b)(4)(D) alone, but by that Section taken together with Sec. 10(k), which prescribes the powers and duties of the Board in jurisdictional disputes to make determinations of which employees are entitled to perform particular work. The Board has construed these two Sections together to hold that only such conduct by a labor union as follows and is in non-compliance with the determination of the dispute by the Board under Sec. 10(k), constitutes an unfair labor practice under Sec. 8(b)(4)(D). *Westinghouse Elec. Corp.*, 94 NLRB No. 63, 28 LRRM 1058.

When Sec. 303(a)(4), as well as Sec. 8(b)(4)(D), is construed together with Sec. 10(k), the conduct defined in it becomes actionable only under the same conditions as the Board requires. Such a construction leads to results in accord with the Congressional purpose and design in dealing with jurisdictional disputes. That purpose was to solve the problems created by such disputes by having the Board resolve them on their merits, through a determination binding on all parties.

of whether certain employees were or were not entitled to particular work. Unless the unions involved complied with the determination of the Board, they were to be subjected to cease and desist orders by the Board and actions for damages by employers. Unless the employer complied, the union which represented the employees that the Board had determined were entitled to the disputed work was to be permitted to picket the employer to compel his compliance, which picketing would be immune from actions for damages or cease and desist orders by the Board. A different construction of Sec. 303(a)(4) would leave employers free to ignore the ruling of the Board under Sec. 10(k).

B. The ruling of the Court of Appeals, that the conduct defined by Sec. 303(a)(4) is actionable whenever it occurs, frustrates this purpose of Congress, by subjecting an employer to no penalty if he fails to comply with the award of the Board, and by permitting him to circumvent the authority of the Board to decide jurisdictional disputes. By holding that the conduct defined in Sec. 303(a)(4) is actionable whether it occurs before or after a determination of the Board under Sec. 10(k), and whether it is supported by, or contrary to, the Board's ruling, the Court of Appeals is construing the section so as to produce absurd, or at least unreasonable, results. The reliance of the Court of Appeals on the so-called "plain language" of Sec. 303(a)(4), to arrive at a construction permitting such absurd or

unreasonable results, violates the principle of *U. S. v. American Trucking Ass'ns.*, 310 U.S. 534, that the literal language of a statute which leads to such results must yield to its purpose.

The legislative history of Sec. 303 which the Court of Appeals claims is inconsistent with the construction of the Section urged by petitioners has been misconstrued by the Court. Furthermore, the failure of Congress expressly to relate Sec. 303(a)(4) to Sec. 10(k) is explainable by the fact that the former Section was added as a hastily devised amendment during the Senate debate on the Act.

II. The Court of Appeals erred in holding that the District Court for the Territory of Alaska is a district court of the United States, and thus permitted to stand error prejudicial to petitioners.

A. When Congress in 1947 employed the phrase "district court of the United States" in Sec. 303(b) of the Act, that phrase had a definite and restricted meaning excluding from its scope the district courts for the territories. *Mookini v. U. S.*, 303 U.S. 201; *McAllister v. U. S.*, 141 U.S. 174. The fact that the status of the District Court for the Territory of Alaska was fully considered when the Judicial Code was revised one year after the passage of the Act, and the Court was then considered not to be a district court of the United States, is further proof that Congress did not intend it to be a district court of the United States within the meaning of Sec. 303(b).

The meaning of the phrase being so clear, it was improper for the Court of Appeals to invest the trial court with a status that the Court thought Congress should have given it. *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1; *U. S. v. Cooper Corp.*, 312 U.S. 600. The grant to a territorial court of the same jurisdiction as is possessed by a district court of the United States does not make the territorial court a district court of the United States. *Reynolds v. U. S.*, 98 U.S. 145.

B. By conceiving itself to be a district court of the United States, the trial court applied to this case provisions concerning jurisdiction, service and agency contained in Sec. 301 of the Act. In each instance, the rules contained in Sec. 301 differed from those which the trial court was required to apply under Alaska law. Under the later rules, the trial court could not have acquired jurisdiction over the person of the International, and would have had to apply more limited rules of agency to the evidence.

III. The failure of the respondent to observe its duty under the Act to attempt to settle the dispute should have been considered as a defense to its action, or in mitigation of damages.

Respondent had a duty under the Act to make reasonable efforts to settle the jurisdictional dispute. Respondent made no such efforts, but instead prolonged the dispute, when it refused to accept the joint request of the two unions involved that the work in question be assigned to employees represented by one

of them. The trial court's instructions to the jury deprived petitioners of their right to have this conduct on the part of the respondent considered as a defense to the action, or in mitigation of damages.

ARGUMENT.

I.

ACTIVITIES OF A LABOR ORGANIZATION FOR THE OBJECT DEFINED BY SEC. 303(a)(4) OF THE ACT ARE NOT ILLEGAL AND HENCE ACTIONABLE UNDER THAT SECTION, UNLESS THEY OCCUR AFTER AND IN THE FACE OF A DETERMINATION BY THE NATIONAL LABOR RELATIONS BOARD, UNDER SEC. 10(k) OF THE LABOR RELATIONS ACT, THAT THE EMPLOYEES REPRESENTED BY SUCH LABOR ORGANIZATION ARE NOT ENTITLED TO THE WORK IN QUESTION.

A. THE INTER-RELATION BETWEEN SECS. 8(b)(4)(D) AND 10(k) OF THE LABOR RELATIONS ACT AND SECTION 303(a)(4) OF THE ACT COMPELS THIS CONCLUSION.

1. Section 303(a)(4) was intended by Congress to make actionable only such conduct as was made an unfair labor practice by Sec. 8(b)(4)(D).

Secs. 8(b)(4)(D) and 303(a)(4) contain virtually identical provisions. For ease of reference and comparison, their language is set forth below in parallel columns with the identical language in each section italicized.

Section 8(b)(4)(D).

"Sec. 8. • • •

"(b) It shall be an unfair labor practice for a labor organization or its agents • • •

"(4) *to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is* • • •

"(D) *forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work* • • •"

Section 303(a)(4).

"Sec. 303. • • •

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization *to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is* • • •

"(4) *forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the* National Labor Relations *Board determining the bargaining representative for employees performing such work* • • •"

That the same conduct is addressed by both sections is demonstrated not only by this identity of language, but also by the legislative history of the Act.[9]

[9]This history has been compiled by the Board and published in the two-volume "Legislative History of the Labor Management Relations Act, 1947", issued by the Government Printing Office. For ease of reference excerpts from the legislative history cited in this brief will be to this work, in the following form: ..... Leg. Hist. .....

In discussing the provisions of the Conference Bill which was subsequently adopted into the present Act, Representative Lesinski made the following statement in connection with Sec. 303(a)(4):

> "* * * Employers are given a cause of action to recover any damages caused by the activities made unfair by Section 8(b)(4)[D]." (1 Leg. Hist. 912.)

Throughout the debate in the Senate on the amendment of Senator Taft, which became Sec. 303 of the Act, not only Senator Taft himself, but all other senators who spoke, both in favor of or against the amendment, were unanimous in construing the purpose of the amendment as simply to create an additional remedy in damages for activities which constituted unfair labor practices under Sec. 8(b)(4). These excerpts from the legislative history are set forth in the margin.[10]

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[10] "Mr. Pepper. Mr. President, I had assumed that the Ball amendment and the Taft amendment had both, in defining the boycott or the jurisdictional strike, employed substantially the same language as is used in section 8 of the bill, where those things are made an unfair labor practice. It just dawned on me that the Senator has made it unlawful—not an unfair labor practice, but he has made it unlawful to engage in a boycott or in a jurisdictional strike. * * *

"* * * was it the desire of the Senator from Ohio to make those acts unlawful?

"Mr. Taft. That is correct. *I may say that the definition is exactly the same as the definition we had of an unfair labor practice.* The effect of making it unlawful is simply that a suit for damages can be brought for that kind of thing. There is no criminal penalty of any sort." (Emphasis added.) (2 Leg. Hist. 1371.)

* * * * * * *

"Mr. Pepper. * * *

"In addition to that, the Senator from Ohio proposes to make the basis of a substantive suit at law for damages what

It is thus clear that Sec. 303(a)(4) was derived from and intended to be co-extensive with Sec. 8(b)(4)(D), and that Congress intended only such conduct as was made unfair by Sec. 8(b)(4)(D) to be actionable under the provisions of Sec. 303(a)(4).

2. The conduct defined by the terms of Sec. 8(b)(4)(D) becomes an unfair labor practice only if it follows and is in noncompliance with a determination of the Board under Sec. 10(k) concerning the employees entitled to the disputed work.

a. The Board has so construed Section 8(b)(4)(D).

Sec. 10(k) of the Labor Relations Act provides:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

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the bill in its principal capacity describes as an unfair labor practice. * * *" (2 Leg. Hist. 1390.)

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"Mr. Ball. I am sorry; if the Senator from Michigan will read subsection (1) of section 10 of the committee bill, on page 33, he will find that no hearing is required. There is simply an investigation by a regional attorney. In any event, *we are defining very clearly, in this amendment and in the pending bill, secondary boycotts and jurisdictional strikes and the definition is the same.* We are defining clearly what we want to make unlawful. * * *" (Emphasis added.) (2 Leg. Hist. 1352.)

The Board has consistently construed this provision to mean that it must make a determination of a jurisdictional dispute under the section before a complaint charging a violation of Sec. 8(b)(4)(D) can issue under Sec. 10(b) of the Act.[11] It has further held that activities of a labor organization, covered by the language of Sec. 8(b)(4)(D) standing alone, which occur prior to a Board determination of the dispute under Sec. 10(k), do not constitute a violation of Sec. 8(b)(4)(D). The review of the Board's conduct under both sections, which follows, will so demonstrate.

The first instance of this interpretation by the Board is given by the Rules and Regulations and Statements of Procedure which it issued under the provisions of Sec. 10(k). After outlining the nature of the investigation to be made upon the filing of a charge under Sec. 8(b)(4)(D), the course to be followed in the event the parties submit satisfactory evidence of the adjustment of the dispute, and the nature of the hearing held to determine which employees are entitled to the disputed work, the Regulations further provide as follows:

> "If, after issuance of certification by the Board, the parties submit to the regional director satisfactory evidence that they have complied with the certification, the regional director shall dismiss the charge. If no satisfactory evidence of compliance

[11] The portions of Sec. 10(b) relevant to the issuance of complaints by the Board provide:

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect . . ."

is submitted, the regional director may proceed with the charge under paragraph 4(D) of section 8(b) and section 10 of the act and the procedure prescribed in sections 203.9 to 203.51, inclusive, shall, insofar as applicable, govern." (Sec. 203.77, Rules and Regulations of the National Labor Relations Board, Series 6.)[12]

This initial interpretation by the Board of the relation between Secs. 10(k) and 8(b)(4)(D) with respect to all charges that the latter section was being violated received a flat challenge in the case of *Juneau Spruce Corp.*, 82 NLRB 650 (1949), but the challenge was rejected, and the Board held squarely that it had no power to issue a complaint pursuant to the provisions of Sec. 8(b)(4)(D) prior to a determination by it under the provisions of Sec. 10(k).[13] That case arose out of the same dispute which resulted in the filing of the action below in the trial court. The respondent here was the charging party before the

[12]Sec. 202.34 of the Board's Statements of Procedure, which is an elaboration of Sec. 203.77 of its Regulations, provides:

"*Compliance with certification; further proceedings.*—After the issuance of certification by the Board, the regional director in the region in which the proceeding arose communicates with the parties for the purpose of ascertaining their intentions in regard to compliance. Conferences may be held for the purpose of working out details. If the regional director is satisfied that parties are complying with the certification, he dismisses the charge. If the regional director is not satisfied that the parties are complying, he issues a complaint and notice of hearing, charging violation of section 8(b), (4)(D) of the act, and the proceeding follows the procedure outlined in sections 202.8 to 202.15."

[13]In an earlier case, *Moore Drydock Company*, 81 NLRB 1108 (1949), the Board made an identical holding, although there the issue was not raised by any of the parties.

Board. It contended that Sec. 10(k) gave the Board power to hear and decide a jurisdictional dispute only where the rights of two or more competing unions in cases of overlapping certifications or orders of the Board were involved. It was argued that Sec. 10(k) was inapplicable in all other instances of inter-union conflict, and that in such cases the Board had the duty of proceeding at once to hearing on the substantive charge of violation of Sec. 8(b)(4)(D).

The Board answered this contention of the petitioner here as follows:

> "We do not agree. We have held in the *Moore Drydock Company* case that, reading Sections 8(b)(4)(D) and 10(k) together, as we are required to do by the amended Act, the Board has no choice but to proceed 'to hear and determine' the dispute out of which the alleged unfair labor practice arose. The purposeful postponement of further proceedings (during the initial 10-day period); *the opportunity afforded the rival unions to reach a settlement* or to agree upon methods for reaching an adjustment of the dispute; the requirement that the charge be dismissed upon a showing that the dispute has been settled (during the initial stage) or compliance effected after the Board decision (the determination of dispute such as that made here); all lend persuasive support to the view that *Congress intended the Board first to attempt to resolve the controversy by means of a Section 10(k) determination.* It is only where it still is necessary thereafter to proceed with the unfair labor practice charge under Section 8(b)(4)(D)—in the event of noncom-

> pliance, for example, with the Determination of Dispute—that a complaint may be issued under Section 10(b). Thus, a Section 10(k) hearing has an effective function, and the Board a definite responsibility to discharge thereunder, to obviate the conventional unfair labor practice proceeding through a statutory device for expediting adjustment of such disputes. Moreover, in the absence of language specifically limiting the application of Section 10(k) to certain situations *only*, or even persuasive legislative history in support of such restricted application, the Board is obliged to give the effect to that Section which its language requires. The interpretation adopted here gives practical meaning to the concluding sentence in Section 10(k) which reads: 'Upon compliance by the parties to the dispute with the decision of the Board or *upon such voluntary adjustment of the dispute, such charge shall be dismissed.*" (Italics supplied; footnotes in the Board's decision are omitted.)

In subsequent cases, the Board has consistently followed this view of its function under Sec. 10(k) and the relation of that section to Sec. 8(b)(4)(D). In *Irwin-Lyons Lumber Co.*, 82 NLRB 916 (1949), the contention was made on a petition for rehearing by one of the parties that the hearing conducted under Sec. 10(k) is governed by the Administrative Procedure Act. In denying the motion for rehearing, the Board stated:

> "We do not agree. Under Section 202.32 of the Board's Rules and Regulations—Series 5, as amended, the hearing under Section 10(k) is non-

adversary in character, and, according to the procedure adopted therefor, conducted in the same way as a hearing in a representation proceeding. The Board adopted such procedure because the decision in the proceedings under Section 10(k) is a preliminary administrative determination made for the purpose of attempting to resolve a dispute within the meaning of that section; the unfair labor practice itself is litigated at a subsequent hearing before a Trial Examiner in the event the dispute remains unresolved. It is to the subsequent adversary hearing, which leads to a final Board adjudication, that Section 8 of the Administrative Procedure Act applies."

See, also, *Winslow Bros. and Smith Co.*, 90 NLRB 1379 (1950); *Stroh Brewery Co.*, 88 NLRB 844 (1950); and *Ship Scaling Contractors Ass'n*, 87 NLRB 92 (1949).

In the case of *Juneau Spruce Corp.*, 90 NLRB 1753 (1950), the Board made it plain that a determination by it under Sec. 10(k) which had not been complied with was essential to a finding of a violation of Sec. 8(b)(4)(D). The Board stated:

"*All* the factors essential to a violation of this section of the amended Act are present: By picketing the Company's premises, the Respondents induced and encouraged the Company's mill and millyard employees to engage in a concerted refusal in the course of their employment to perform services for the Company; the Respondents' object was to force the Company to assign the bargeloading work to the members of Local 16, or workers dispatched by Local 16, instead of to

the mill and millyard employees; the Company was not failing to conform to a certification of the Board determining the bargaining representative of the employees performing the bargeloading work, for there has been no such certification; *and, finally, the Respondents did not comply with the Board's Decision and Determination of Dispute in the previous proceeding held under Section 10(k) of the Act.*" (Italics supplied; footnotes in the Board's decision are omitted.)

Finally, in *Westinghouse Electric Corp.*, 94 NLRB No. 63, 28 LRRM 1058, decided by the Board after the opinion of the Court of Appeals was rendered,[14] the Board again construed both sections to mean that a strike, within the plain terms of Sec. 8(b)(4)(D), which occurs prior to a Board determination of the dispute under Sec. 10(k), does not constitute a violation of Sec. 8(b)(4)(D).[15] According to the Board,

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[14]But called to the attention of that Court in the Petition for Rehearing.

[15]Earlier in the case, the Board had issued a 10 (k) determination adverse to the labor organizations involved, against which (8) (b) (4) (D) charges had been filed. (83 N.L.R.B. 477.) A hearing then took place on the question of whether the respondent unions had committed the unfair labor practice defined in Section 8 (b) (4) (D). Based on that hearing, which did not consider events following the Board's 10(k) determination, the Trial Examiner found that Section 8 (b) (4) (D) had been violated. The Board remanded the case to the Trial Examiner, stating in the course of its order:

"The Respondents contended, inter alia, that they had complied with the Board's 10 (k) determination in this case. No evidence with respect to such compliance or noncompliance was adduced at the hearing before the Trial Examiner.

"We are of the opinion that the intent of Congress was that the General Counsel should allege and prove noncompliance with our 10 (k) determination in 8 (b) (4) (D) proceedings. Accordingly, we shall reopen the record in this case, and re-

then, only a strike or picketing which occurs after a Sec. 10(k) determination adverse to the union engaging in such activities, can violate Sec. 8(b)(4)(D).

It is submitted that this construction of the two sections by the Board is the only proper one that can be made.[16] It is supported not only by the reasons advanced by the Board in the first *Juneau Spruce* case and other decisions, but also by the legislative history of Secs. 10(k) and 8(b)(4)(D).

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mand it to the Trial Examiner to give the General Counsel an opportunity to amend his pleadings and to introduce evidence to sustain his burden of proof." (Footnotes omitted.) Thereafter, following an additional hearing, the Trial Examiner again found that the respondent unions had violated Section 8 (b) (4) (D), basing his finding on a strike called by the union *before* the Board's 10 (k) determination had been made. In reversing the Trial Examiner's finding, the Board said:

"Clearly, the strike *before* the determination cannot prove noncompliance with the determination."

There being no evidence that the strike had continued after the 10 (k) determination, the Board dismissed the complaint.

[16]As the interpretation of the administrative agency charged with the duty of enforcing the legislation, it is entitled to great weight. *New York, New Haven and H.R. Co. v. Interstate Commerce Commission*, 200 U.S. 361; *Shapiro v. United States*, 335 U.S. 1. Particularly is this true with respect to the legislation here under discussion. Sections 401, 402, and 403 of the Act established a joint congressional committee known as the Joint Committee on Labor-Management Relations, a duty of which was to report to Congress on the administration and operation of existing federal laws relating to labor relations. The construction which the Board has placed on Sec. 10(k) has come directly to the attention of Congress through the reports of this committee. (Rep. No. 986, Part 3, 80th Cong., 2d Sess., at page 57.) The continued existence of these sections of the Labor Relations Act in their original state attests to the fact that the Board is carrying out the legislative intent in its administration of Secs. 10(k) and 8(b)(4)(D).

b. Such a construction by the Board fully accords with the intention of Congress as disclosed by the legislative history.

The treatment which the respective houses of Congress gave jurisdictional disputes in the bills which originated in each was vitally disparate. H. R. 3020, the House version of the legislation, outlawed entirely concerted action by labor organizations arising out of jurisdictional disputes.[17] The Senate, however, adopted a different approach. Recognizing that jurisdictional disputes were in a special category and that experience had shown that obstructions to commerce arising from them could best be removed not by outlawing them completely but by a fair adjustment of them, the Senate provided for such an adjustment in its bill, S. 1126. Thus, when the Senate bill was reported to the Senate by its Committee on Labor and Public Welfare, it was made clear that Sec. 10(k) of that bill had been derived from the bill originally

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[17] This was accomplished by the provisions of Secs. 2(15) and 12(a)(3)(A).

Section 2(15) provided as follows:

"The term 'jurisdictional strike' means a strike against an employer, or other concerted interference with an employer's operations, an object of which is to require that particular work be assigned to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class." (1 Leg. Hist. 42-43.)

Section 12(a)(3)(A) provided as follows:

"The following activities, when affecting commerce, shall be unlawful concerted activities: • • •

"(3) Calling, authorizing, engaging in, or assisting——

"(A) any sympathy strike, jurisdictional strike, monopolistic strike, or illegal boycott, or any sit-down strike or other concerted interference with an employer's operations conducted by remaining on the employer's premises." (1 Leg. Hist. 77-78.)

introduced by Senator Morse to deal with jurisdictional disputes.[17a]

Sections 8(b)(4)(D) and 10(k) of S. 1126 provided as follows:

Sec. 8(b)(4)(D): "It shall be an unfair labor practice for a labor organization or its agents * * *

* * * * * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services in the course of their employment * * * (D) for the purpose of forcing or requiring any employer to assign to members of a particular labor organization work tasks assigned by an employer to members of some other labor organization unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work tasks * * *" (1 Leg. Hist. 112-114.)

Sec. 10(k): "Whenever it is charged that any person has engaged in an unfair labor practice

[17a] Senator Morse stated:

"I am very happy that on March 10, in a speech which I am sure my colleagues at the time thought was too long, I laid the foundation for my proposals for amendments to the Wagner Act. At that time I offered S. 858, containing the specific proposals which I recommended in that speech insofar as the Wagner Act was concerned. I am very pleased that in the bill which we are reporting today practically all of the provisions of S. 858 are contained in it plus some refinements of S. 858 which I have developed on the issues since my speech on March 10, 1947." (2 Leg. Hist. 1000-1001.)

S. 858 provided that jurisdictional disputes be dealt with by arbitration.

within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen or to appoint an arbitrator to hear and determine such dispute, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or the arbitrator appointed by the Board *or upon such voluntary adjustment of the dispute,* such charge shall be dismissed. The award of an arbitrator shall be deemed a final order of the Board." (Italics supplied.) (1 Leg. Hist. 130-131.)

Senate Report No. 105 on S. 1126 explained these sections as follows:

"Jurisdictional disputes that constitute unfair labor practices within the meaning of section 8(b)(4)(D) may be heard by the Board or an arbitrator unless within 10 days the parties satisfy the Board that *they have adjusted the dispute or agreed to methods for adjusting it.* If the parties comply with the determination of the Board or the arbitrator appointed by it, *or voluntarily adjust the dispute,* the Board shall dismiss the charge. Finally, the award of the arbitrator is given the same status and force as a final order of the Board, a provision which will avoid the necessity of the Board hearing the dispute if it has designated an arbitrator for that purpose and also will permit the Board to seek enforcement

of the award without further proceedings." (Italics supplied.) (1 Leg. Hist. 433.)

When the conference of the two houses had met, considered the differing versions of the bills they had initially passed, and then reported to their respective houses the bill which subsequently became the Act, House Conference Report No. 510 on H.R. 3020 had this to say with respect to the version finally adopted:

> "The Senate amendment also contained a new section 10(k), which had no counterpart in the House bill. This section would empower and direct the Board to hear and determine disputes between unions giving rise to unfair labor practices under section 8(b)(4)(D) (jurisdictional strikes). The conference agreement contains this provision of the Senate amendment, amended to omit the authority to appoint an arbitrator. If the employer's employees select as their bargaining agent the organization that the Board determines has jurisdiction, and if the Board certifies that union, the employer will, of course, be under the statutory duty to bargain with it." (1 Leg. Hist. 561.)

This legislative history establishes that the view of the Senate concerning the best method with which to deal with jurisdictional disputes prevailed, and that the bill as finally enacted embodied a basic distinction between such disputes and secondary boycotts, concerning which no procedure analogous to that of Sec. 10(k) was included. The emphasis with respect to jurisdictional disputes was on a settlement of the dispute on its merits. Should the parties them-

selves fail to settle the dispute, the determination of the dispute was left with the Board. It was only when a union involved in the dispute failed to comply with the determination of the Board that concerted activities of labor organizations in connection with such a dispute were to become unfair labor practices under the provisions of Section 8(b)(4)(D).

This consideration of the legislative history of the sections of the Labor Relations Act relating to jurisdictional disputes demonstrates conclusively that the Board is correct in holding a Sec. 10(k) determination, and a non-compliance therewith, to be an essential element of a finding on its part that conduct has been an unfair labor practice under Sec. 8(b)(4)(D).

3. Not only Sec. 8(b)(4)(D), but Sec. 303(a)(4) also must be construed in the light of Sec. 10(k), in view of the congressional purpose and statutory plan for dealing with jurisdictional disputes.

The legislative history of the Act does more than support the soundness of the Board's construction of Secs. 8(b)(4)(D) and 10(k), which we have reviewed. It illuminates the over-all plan of the statute for dealing with the problems of jurisdictional disputes, and clarifies the function of Sec. 303(a)(4) within that plan. When the Senate view, that the problem of obstructions to interstate commerce arising out of jurisdictional disputes could best be met by giving the Board authority to arbitrate such disputes on their merits, in order to finally settle them, prevailed over the sweeping position of the House that all activities of labor organizations arising out of such disputes

should be outlawed whenever they occurred, without regard to their equitable settlement, Congress determined as a matter of policy to penalize only such primary activities of labor organizations[18] in jurisdictional disputes as were carried on in the face of a Board determination adverse to the labor organization in question. The Board's correct construction of Sec. 8(b)(4)(D) is based upon that policy. The proper construction of Sec. 303(a)(4) must equally be based upon it. So viewed, all of the provisions of the Act dealing with jurisdictional disputes are consistent with each other and work together to achieve the congressional objective of having such disputes resolved either by the parties or by the Board, whose award Congress intended to bind all parties to the dispute, including the employer. Thus, in Sec. 10(k), the parties to the dispute were given, in the first instance, authority to settle the dispute among themselves.[19] Failing such a settlement, the Board was given authority, under Sec. 10(k), to arbitrate the dispute, and to make an award determining which of the contending labor organizations was entitled to have the employees it represented perform the work in question. For reasons not revealed by Congress, this award of the Board

[18]That is, activities directed against the employer with whom the union was engaged in a dispute.

[19]The pertinent provisions of Sec. 10(k) read:

". . . unless, within ten days after notice that such charge [under Sec. 8(b)(4)(D)] has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. . . . upon such voluntary adjustment of the dispute, such charge shall be dismissed."

See *Manhattan Construction Co., Inc.*, 90 NLRB No. 160, 29 LRRM 1002, Oct. 24, 1951.

was not made directly enforcible by petition to the Courts of Appeals, as was the case with other orders of the Board. Instead, adherence to it was encouraged by providing certain penalties or disabilities for noncompliance. Thus, if a contending labor organization against whom the Board's award had been adverse persisted in seeking the work by picketing the employer after the Board had ruled against it, it subjected itself to a cease and desist order under Section 8(b)(4)(D) and became liable under Section 303(a)(4) for any damages caused by picketing carried on after the award had been made. On the other hand, if the employer refused to abide by the Board's award, the union could seek to enforce it by primary economic action against him, secure from both a proceeding under Section 8(b)(4)(D) and an action for damages under Section 303(a)(4).

Under the statute as finally passed, economic action against a primary employer,[20] by which a union sought to protect the amount and types of work performed by the employees whom it represented, was not made illegal per se, as the House bill would have done. On the contrary, such action remained within the category of lawful primary strikes, *subject to becoming an unfair labor practice under Sec. 8(b)(4)(D) and actionable under Sec. 303(a)(4) if persisted in after a Board determination under Sec. 10(k) adverse to the union involved.*[21]

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[20]That is, an employer with whom a union was directly engaged in a dispute over work assignments.

[21]Recognizing that the public interest might be adversely affected by a union's primary activities to protect a work assign-

In the light of the over-all statutory scheme and congressional purpose and policy just outlined, the Board's construction of Sec. 8(b)(4)(D) in accordance with it, and the express congressional intention to make actionable under Sec. 303(a)(4) only such conduct as was made unfair by Sec. 8(b)(4)(D), it follows without question that an essential element of a cause of action under Sec. 303(a)(4) is proof that the conduct defined therein followed and was adverse to a Sec. 10(k) determination by the Board in the particular jurisdictional dispute. Yet the Court of Appeals held squarely to the contrary. We shall demonstrate that the reasons advanced by it for its holding are untenable, and that its judgment upholding that of the trial court accordingly must be reversed.

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ment, which occurred before a Board award under Sec. 10(k) had determined the merits of the dispute, Congress provided the General Counsel of the Board, in Sec. 10(l) of the Labor Relations Act, with discretionary power to seek injunctions against such activities in the district courts of the United States immediately after a charge is filed under Sec. 8(b)(4)(D), and before the Board's determination under Sec. 10(k) is made. The provisions of Sec. 10(l) are set forth in the Appendix, pages iv to v. The parts of Sec. 10(l) pertinent here provide:

> "... In situations where such [injunctive] relief is appropriate, the procedure specified herein shall apply to charges with respect to Sec. 8(b)(4)(D)."

Congress further provided, in Secs. 8(b)(4)(A), 10(l) and 303(a)(4) of the Act, for unfair labor practice proceedings, injunctions, and suits for damages, should a union involved in a jurisdictional dispute extend its activities to secondary employers. These sanctions against secondary boycott activities in connection with a jurisdictional dispute came into play whether such secondary activities occurred before or after a determination of the dispute by the Board under Sec. 10(k), since secondary boycotts were illegal per se, whenever they occurred.

B. THE RULING OF THE COURT OF APPEALS TO THE CONTRARY LEADS TO A FRUSTRATION OF CONGRESSIONAL PURPOSE AND MAKES THE VARIOUS PROVISIONS OF THE ACT DEALING WITH JURISDICTIONAL DISPUTES INCONSISTENT WITH EACH OTHER.

The Court of Appeals held that proof of non-compliance by a union with a Sec. 10(k) determination was not an essential element of a cause of action under Sec. 303(a)(4), or to use its own language, "was not a jurisdictional prerequisite to maintaining the instant cause of action." (R. 1134.) It rejected the position of the petitioner as not sustained by either the legislative history or the plain language of Sec. 303(a)(4). (R. 1134.)

It did not dispute, or even mention, the legislative history of the Act heretofore cited to support the view of the petitioners concerning the over-all approach adopted by Congress for the resolution of jurisdictional disputes. Nor did it deal with the legislative history cited by petitioners to establish that Sec. 303(a)(4) was intended to make actionable only such conduct as was made unfair by Sec. 8(b)(4)(D). It avoided a determination of the correctness of the interpretation by the Board of Sec. 8(b)(4)(D) as unnecessary to its decision in the present case. It is evident, then, that the Court of Appeals did not dispose of the arguments advanced by petitioners by answering them, but, on the contrary, ignored them.

Before considering the reasons advanced by the Court of Appeals to support its view of the meaning of Sec. 303(a)(4), we shall consider the mischief which its holding performs.

In considering the essential elements of a cause of action under Sec. 303(a)(4), the Court of Appeals stated:

> "As we view this Section of the Act, a plaintiff, to maintain an action for damages, is required to show that a labor organization has engaged in or induced the employees of any employer to engage in a strike, etc., and that an object of such conduct was to force or require any employer to assign particular work to employees in a particular labor organization or group rather than to employees in another group; and further that the employer is not failing to conform to a Board order or certification determining the bargaining representative for employees performing such work. All of these requirements were adequately pleaded and proved in the instant case." (R. 1130-1131.)

This holding would lead to the following results, among others:

(a) A Board determination could be made under Sec. 10(k) that the employees represented by one union, rather than the employees represented by another, were entitled to perform particular work for an employer. Such a determination would not depend on a prior certification of the union whose rights to the work were upheld. It could be based on such criteria as the "custom in the trade and in the area, the constitutions and peace treaties of the contending labor organizations themselves, the technological evolution of

the disputed tasks, and [the] like * * *",[22] or on the construction of collective bargaining agreements held by rival unions with the same employer.[23] If the employer refused to abide by the Board's determination, the union's only effective recourse would be to picket his premises to require him to abide by it.[24] It could not file an unfair labor practice charge against him, for an employer's refusal to abide by a Sec. 10(k) determination of the Board is not made an employer unfair labor practice. Yet, despite the fact that picketing to enforce a Sec. 10(k) certification is not an unfair labor practice, if the interpretation of Sec. 303(a)(4) made by the Court of Appeals were followed, the employer could sue and collect damages from a union for picketing caused by *his* failure to comply with the Board's determination of the dispute.

The view of the statute adopted by the Court of Appeals thus removes the only effective assurance that employers will abide by awards of the Board resolving jurisdictional disputes on their merits. It makes the decisions of the Board under Sec. 10(k) binding on unions, but only advisory as to employers, and hence defeats the object of

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[22] All of which are mentioned as guides to the Board in *Juneau Spruce Corp.*, 82 NLRB 650 (1949), dissenting opinion of Member Murdock, at footnote 21.

[23] This was the chief basis for the Board's determination in *Winslow Bros. and Smith Co.*, 90 NLRB 1379 (1950).

[24] As has already been indicated, under the Labor Relations Act no provision is made for direct enforcement by the Board through the Courts of Appeals of its Sec. 10(k) awards.

Congress to make the Board's determination under that Section binding upon all of the parties to the dispute.

(b) An employer could re-assign work done by employees represented by one labor organization to the employees represented by another, without any justification therefor. In such a case, the Board might find that the first group of employees were rightfully entitled to continue to perform the particular work. Especially would this be the case if the labor organizations themselves, by a jurisdictional pact, had previously agreed to the division of work originally existing. The first labor organization might picket the employer to correct the inequitable situation. The employer could prevent a Board determination of the dispute by the simple expedient of refusing to file charges under Sec. 8(b)(4)(D) against either labor organizations. Instead, under the view of Sec. 303(a)(4) adopted by the Court of Appeals, he could sue the union for damages, and prevail. He would thus be rewarded for creating the very obstruction to commerce which the Act is designed to prevent.

That Congress did not intend such absurd results to flow from Sec. 303(a)(4) is manifest. The Section was not created to nullify the results to be achieved by the Board under Sec. 10(k). It was designed to implement the remedies available to employers against unions which persisted in seeking particular work for

employees they represented *after an adverse Board determination under Sec. 10(k).* Conversely, it could hardly have been intended to create a cause of action on behalf of employers who themselves refused to abide by a Board determination under Sec. 10(k), or *who refused to avail themselves of the machinery of the Board* which Congress intended was to be employed in the first instance in order to achieve a determination of the dispute binding on all the parties.

The Court of Appeals did not deny that such absurd and incongruous results would follow in other cases from its construction of Sec. 303(a)(4). It merely pointed out that such results could not follow in the present case because, under the facts of this case, the Board could not fail to make a determination under Sec. 10(k) that was adverse to petitioners here. The difficulty with this attempted explanation of the Court of Appeals is that its decision concerning the meaning of Sec. 303(a)(4) will apply to all cases under the Section, including those in which a union's claim that the employees it represents are entitled to particular work has been upheld by the Board.

The Court of Appeals suggested further that the unreasonable results outlined above would not follow from its construction of Sec. 303(a)(4) unless the Board actually did have authority under Sec. 10(k) to determine which employees are entitled to disputed work. In making that suggestion, the Court undoubtedly was mindful of the position respondent urged upon it, that the Board had no such authority under

Sec. 10(k). Since respondent presented the same position to this Court in its brief opposing the grant of writ of certiorari,[25] it will be discussed and disposed of here.

We turn then to respondent's position concerning the meaning of Sec. 10(k) of the Labor Relations Act, and the Board's function thereunder. As presented to the Court of Appeals, it was as follows:

The Board's duty under Sec. 10(k) "is not to *decide between union claims*, which may be on certification, interunion work-defining agreements, traditional jurisdiction, *et cetera*, for which a skilled arbitrator would be needed. Instead, the questions for decision are simply (1) To whom has the employer assigned the work in issue? and (2) Is that assignment of work in contravention of a certification of the National Labor Relations Board under Sec. 9(c) of the National Labor Relations Act?"[26] If the Board's answer to the second question is in the negative, according to respondent, the Board *must* find that the organization to whom the employer has assigned the work is entitled to it. The Board, says appellee, has no discretionary authority whatsoever under Sec. 10(k), and the inquiry it makes under the section is a mere formality. In fact, it is contended, the inquiry which it can make under Sec. 10(k) is limited to and identical with that which it must make in determining whether Sec. 8(b)(4)(D) has been violated. Hence,

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[25]Respondent's Brief Opposing Petition for Writ of Certiorari, pp. 9-10.

[26]Respondent's Brief, Court of Appeals, p. 21.

Sec. 10(k) not only fails to give the Board authority to arbitrate a jurisdictional dispute on the merits, but is in effect superfluous, since it adds no authority to that given the Board under Sec. 8(b)(4)(D). Under this view of Sec. 10(k), respondent argues that, absent a pre-existing certification of the Board under Sec. 9(c), the issue of who is entitled to the work never arises in a hearing under Sec. 10(k), or in an unfair labor practice proceeding under Sec. 8(b)(4)(D). Thus, respondent claims, a situation can never occur in which a union has had disputed work awarded by the Board to employees it represents. That being the case, says respondent, no case could ever arise in which a union could be found liable under Sec. 303 (a)(4) for picketing to compel an employer to abide by a Sec. 10(k) award of the Board.

To support this view of the meaning of Sec. 10(k), respondent relies on the process of amendment to which Sec. 8(b)(4)(D) was subjected before it emerged in final form. According to respondent, these amendments somehow changed the intention of Congress that jurisdictional disputes should be arbitrated on their merits, and substituted for such intention the view that once an employer had assigned work to employees represented by a particular labor organization, that assignment was just and proper. Respondent thus argues, in effect, that even though the language of Sec. 10(k) *as passed* clearly supports the authority of the Board to arbitrate a jurisdictional dispute, its language must be ignored because of the amendments made to Sec. 8(b)(4)(D) during its

progress through Congress. In alleged support of this position, respondent points to Board decisions under Sec. 10(k), the language of which indicates that in some cases the employers' assignment of work will be considered determinative of the question of who is entitled to work.[27]

The argument of respondent cannot be accepted for many reasons. In the first place, it asks this Court to ignore the existence of Sec. 10(k), in violation of the elementary rule that a statute should be construed so that effect is given to all its provisions.[28] Secondly, respondent's position concerning Sec. 10(k), and the Congressional intent regarding jurisdictional disputes, is untenable in the light of the legislative history of the Section. Thus, the authoritative explanation of the meaning of Sec. 10(k) in the bill as passed given by the managers of the conference on the part of the House[29] clearly demonstrates the intention of Congress to give the Board authority under Sec. 10(k) to arbitrate jurisdictional disputes, and to determine which labor organization has jurisdiction of the disputed work.[30] In addition, the remarks of Senator Morse, made during the Senate debate on the

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[27] An example of such language appears in *Los Angeles Bldg. and Construction Trades Council*, 83 NLRB 477 (1949).

[28] *Sutherland, Statutory Construction*, 3rd Ed. (Horack), Vol. 2, Sec. 4705.

[29] The explanation is reprinted in full at page 35, *supra*.

[30] This is established by the following sentence in the statement: "If the employer's employees select as their bargaining agent *the organization that the Board determines has jurisdiction* and if the Board certifies that union, the employer will, of course, be under the statutory duty to bargain with it." (Italics supplied.) (1 Leg. Hist. 561.)

Conference Bill in the form in which it finally became law, make it clear that Sec. 10(k) as finally passed was intended by Congress to give the Board full discretionary authority to arbitrate jurisdictional disputes.[31] The fact that the Senator, whose own bill S. 858 was the genesis of Secs. 8(b)(4)(D) and 10(k), recognized that the bill as passed gave the Board the same authority to settle jurisdictional disputes as would have been exercised by an arbitrator under his bill, and that his views were not disputed by any other senator, again refutes the respondent's contention. These two excerpts from the legislative history

[31] Senator Morse stated:

"In this connection we must examine, too, the provisions of the bill requiring the Board to determine:

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"Second. What are proper work-task allocations as between unions in jurisdictional strikes.,

"The Board must perform both of these tasks without the assistance of economic analysts, for under section 4 (a) of the bill it is forbidden to hire such employees. This is much like requiring the Veterans' Administration to provide hospital and medical care for veterans but forbidding them to employ doctors and nurses.

"I am especially disturbed about the amendment made in conference which requires the Board itself, rather than an arbitrator, to decide these jurisdictional disputes. I think the provision is completely unworkable. Under this provision the Board will have to hear and decide the merits of the disputes in the motion-picture industry and the controversy of over 50 years' standing between the teamsters and brewery workers unions, to mention only a few.

"The provision in the Senate bill authorizing the Board to appoint an arbitrator to settle jurisdictional disputes over work assignments was taken from the bill I introduced, S. 858.

"One of the major reasons for suggesting that an arbitrator, rather than the Board itself, handle these problems was that time is of the essence and the regular procedure of the Board is not an effective remedy for these cases. I certainly agree that jurisdictional disputes must be settled, but I am satisfied that the procedure now set up in the bill is not an effective solution." (2 Leg. Hist. 1554.)

demonstrate that after Secs. 8(b)(4)(D) and 10(k) had been amended *into their final form,* both houses of Congress fully intended to give the Board authority to arbitrate under Sec. 10(k).

In the third place, respondent cannot deny that the Board itself, whose interpretation of the Act is entitled to great respect,[32] has rejected its position concerning the meaning of Sec. 10(k). It did so not only by its direct ruling in the case of *Juneau Spruce Corporation,* 82 NLRB 650 (1949),[33] but by its decisions in all subsequent cases. Furthermore, despite respondent's assertion that "the Board does not consider itself empowered in a 10(k) proceeding to make any affirmative award of disputed work",[34] the Board made just such an award in the case of *Winslow Bros. & Smith Co.,* 90 NLRB 1379. There, the disputed work had already been assigned by the employer to an employee represented by the Teamsters Union. Despite this fact, and the absence of a pre-existing 9(c) certification on behalf of either the Teamsters or the Fur and Leather Workers Union, the other union involved, the Board held that the work should be reassigned to an employee represented by the Fur and Leather Workers Union.[35]

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[32]See note 16, supra, p. 31.

[33]See pp. 27-28, supra.

[34]Respondent's Brief Opposing Petition for Writ of Certiorari, p. 10.

[35]The Board's "Determination of Dispute" in that case read as follows:

"1. The job of operating the cab and trailers for intraplant moving of materials among the buildings of the Winslow Bros. & Smith Co., plant at Norwood, Massachusetts, is included in the production and maintenance employees unit presently

The *Winslow Bros. & Smith Co.* case offers an excellent illustration of the frustration of Congressional purpose which would result if respondent's views concerning the meaning of Sec. 10(k) were adopfed. For, under respondent's reasoning, the mere fact that the work had already been assigned by the employer in that case would constitute a determination of who was properly entitled to the work. If the Board had conceived its inquiry under Sec. 10(k) to be that claimed by respondent, it would have been compelled to find that the employees represented by the Teamsters were entitled to perform the disputed work task, irrespective of whether such a result would have accorded with the equities, or encouraged harmonious labor-management relations. By its decision, the Board recognized the Congressional intention that the power of employers to assign work to whomever they pleased should yield to the judgment of the Board, based as it was on the interests of all the parties and the public, and not merely on that of the employer.

The respondent fails to see that by its treatment of jurisdictional disputes, Congress intended to limit what respondent still insists is the employer's plenary power to assign work. Such a restriction of employer authority undoubtedly is unpalatable to some employers. It may be said that such a restriction is no more palatable to some employers than was the re-

represented by Local 26, International Fur and Leather Workers Union of the United States and Canada, and not in the truck drivers unit now represented by Local 25, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL." (90 NLRB 1379, at 1385.)

striction contained in the original Section 7 of the Wagner Act on the employers' theretofore unlimited power to hire and fire. In each instance, however, Congress has exercised its judgment that the restriction of employer power in question is justified by the power of Congress to regulate labor-management relations in the public interest.

All of the foregoing effective refutes respondents' views with respect to Sec. 10(k). More than that, it demonstrates the error in respondent's position that the question of who is entitled to the work is never an issue in an action under Sec. 303(a)(4). For, if that question is one that must be decided by the Board before conduct can become unfair under Sec. 8(b)(4)(D), it is equally necessary that it be determined by the Board before conduct can become actionable under Sec. 303(a)(4).

Having demonstrated that the construction placed upon Sec. 303(a)(4) by the Court of Appeals will lead to absurd results completely at variance with the purpose of Congress, we turn to a consideration of the merit of the reasons assigned by the Court of Appeals for its holding. As we have indicated, these are: First, that the legislative history of Sec. 303(a)(4) does not support the position of petitioners; and second, that the plain language of Sec. 303(a)(4) is inconsistent with it. These will be discussed in order.

1. The legislative history of Sec. 303 is completely consistent with the construction of the Section urged by petitioners, and has been misconstrued by the Court of Appeals.

Sec. 303 of the Act, of which Sec. 303(a)(4) is a part, was offered by Senator Taft as a substitute for an amendment proposed by Senator Ball to S. 1126, the Senate version of the legislation, during the Senate debate on that bill.[36] As we have already indicated, its purpose was to give employers an action for damages for conduct of labor organizations made unfair labor practices by the provisions of Sec. 8(b)(4) of the Labor Relations Act.

The debate on the amendment centered largely on the question of the wisdom of permitting the courts and the Board to deal simultaneously with the same subject matter, the courts in order to determine whether an action for damages would lie, and the Board in order to decide whether an unfair labor practice had been committed.[37] It is true, as the Court of Appeals indicates, (R. 1134) that nowhere in the debate on the Taft amendment is there to be found any indication of an intent to have the civil actions provided for in Sec. 303 await the outcome of proceedings of the Board to determine whether unfair labor practices have been committed. The debate further indicates, as the Court states, that "[t]he plain purpose was to provide direct court action by the injured party as a further deterrent against engaging

[36]The Taft amendment was offered after the Ball amendment had been defeated. (2 Leg. Hist. 1369-1370.)

[37]See, for example, the remarks of Senator Morse in opposition to the Taft amendment. (2 Leg. Hist. 1358.)

in the prohibited conduct". (R. 1134.) The fact is, however, that nothing in the debate on the Taft amendment is inconsistent with the position of petitioners concerning the meaning of Sec. 303(a)(4), and the Court of Appeals is wrong in drawing such a conclusion. It arrives at such an erroneous conclusion by confusing the question of what conduct is prohibited by Sec. 303(a)(4), with the question of when an action can be brought under the Section.

We would be the first to affirm the position that nothing in the Act requires actions for damages under Secs. 303(a)(1), (2), and (3), to await the issuance by the Board of cease and desist orders under Secs. 8(b)(4)(A), (B) and (C). This is equally true under Sec. 303(a)(4). Such actions can undoubtedly be brought before the Board has issued a cease and desist order under Sec. 8(b)(4)(D). Thus, petitioners' position does not require that an actior under Sec. 303(a)(4) be postponed until the Board has issued a cease and desist order under Sec. 8(b)(4)(D). Petitioners contend merely that an action under 303(a)(4) must necessarily await a determination of the Board under Sec. 10(k) for the reason that if brought prior to such a determination it would be lacking in an essential element necessary to make the conduct, which was the subject of the action, prohibited conduct, namely, that it was in non-compliance with a determination of the Board under Sec. 10(k).

Once the determination of the Board has issued under Sec. 10(k), and a union has failed to comply

with it, such union subjects itself to a simultaneous proceeding before the Board and in the courts, leading to a cease and desist order on the one hand, and a judgment for damages on the other. The lack of reference in the debate on the Taft amendment to the relation between a determination of the Board under Section 10(k) and a cause of action under Sec. 303 (a)(4) does not make the legislative history of the amendment inconsistent with our view of the meaning of Sec. 303(a)(4). It means only that the relationship between Sec. 10(k) and Sec. 303(a)(4) was not material to the question of whether unfair labor practice hearings should proceed simultaneously with damage actions based on the same type of conduct. That question was common to all of the subdivisions of Sec. 303, including Sec. 303(a)(4). The relationship to Sec. 10(k), however, was unique to Sec. 303 (a)(4).[38] It is apparent, then, that the Court of Appeals was in error in its conclusion that the legislative history of Sec. 303 was inconsistent with the construction of Sec. 303(a)(4) advanced by petitioners.

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[38]This result followed from the differing Congressional treatment under the Act of jurisdictional disputes on the one hand, and secondary boycotts on the other. Congress determined to deal with the problem of secondary boycotts by making the ban on them complete, irrespective of the merits of the dispute giving rise to them. (See the remarks of Senator Taft at 2 Leg. Hist: 1106.) Accordingly, no procedure was included in the Labor Relations Act under which the Board was given authority to settle the dispute out of which a secondary boycott arose, and labor unions engaging in them were made subject unqualifiedly to unfair labor practice proceedings, and to actions for damages.

2. The failure of Congress expressly to relate Sec. 303(a)(4) to Sec. 10(k) is explainable by the origin of the former section.

The Court of Appeals declared that the construction of Sec. 303(a)(4) urged by petitioners was not supported by the "plain language" of the Section. (R. 1134.) It is true that its language does not expressly provide that the conduct defined in it should become actionable only when carried on in the face of a determination of the Board under Sec. 10(k) adverse to the union engaging in it. But neither, for that matter, does the language contained in Sec. 8(b)(4)(D), standing alone, define the corresponding unfair labor practice which Congress intended to create. In that fact lies the very reason for rejecting the literal terms of Sec. 303(a)(4) as determinative of the conduct made actionable by it. It is reasonable to believe that Senator Taft, the author of the amendment which became Sec. 303 of the Act, erroneously assumed that the unfair labor practices defined in S. 1126[39] would be made actionable under Sec. 303 simply by incorporating into Sec. 303 the exact language used in Sec. 8(b)(4) of the Senate bill. He overlooked completely the fact that, unlike the other unfair labor practices involved, the unfair labor practice dealing with jurisdictional disputes was fully defined, not simply by the language in Sec. 8(b)(4)(D), but by its language taken together with the language of Sec. 10(k). Thus fully defined, the intention of Congress to make primary activities of labor organizations in connection

[39]The bill originally reported by the Senate Committee on Labor and Public Welfare.

with jurisdictional disputes unfair labor practices only when they occurred under certain conditions is completely carried out. By failing to carry over into Sec. 303 language which would have made such activities actionable only under the same conditions, the framer of the amendment failed to carry out his intention to define as actionable under Sec. 303(a)(4) the same conduct which was proscribed as an unfair labor practice in the provisions of S. 1126, as reported.

There is evidence from which to conclude that had the provisions of Sec. 303 been given more careful attention, the omission under discussion would never have occurred. As the debate in the Senate shows, inadequate attention was given to the problem of drafting the language of the Taft amendment so as to make it consistent with the unfair labor practice definitions from which it was taken. During the debate, Senator Morse stated:

> "If the Senator will indulge me, may I say further that I think all the discussion, the amendments that are now proposed, and the corrections that have been made here on the floor of the Senate to the pending amendment, show that here is a problem that ought to be referred for further study to the committee proposed in another section of the committee bill. I think the pending Taft amendment is a perfect example of hastily devised legislation. I think the problem involved in it ought to go back to committee. I think we ought to take the committee bill and stop muddying the water, so to speak, by adding more and more amendments to it." (2 Leg. Hist. 1380-1381.)

The failure of Congress to conform the language of Sec. 303(a)(4) to its intention in adding the Section, and to expressly relate Sec. 303(a)(4) to the determination of the dispute provided for by Sec. 10(k), is thus seen to be explainable by the origin of the former Section. This demonstrates even more clearly the absence of reason in the reliance by the Court of Appeals on the so-called "plain language" of the Section. In asking the Court of Appeals to construe the Section in accordance with their contention, petitioners were not seeking to have the Court rewrite the statute "* * * to give an effect to the law which may be supposed to have been designed by the Legislature * * *";[40] on the contrary, they were asking the Court to recognize that the express intention of the Legislature had not been fully embodied in the language of the Section, because of the circumstances under which it was added to the statute.

3. Even if the language of Sec. 303(a)(4) is to be considered plain, its literal meaning must yield to the general purposes of the statute to avoid the unreasonable results that would otherwise follow.

An even more compelling reason existed for the Court of Appeals to reject the so-called "plain language" of the Section.[41] As we have pointed out, the

[40] *Denn v. Reid*, 10 Pet. 524, 527.

[41] Even the assumption of the Court of Appeals that the language of Sec. 303(a)(4) is clear and unambiguous is unwarranted. The Section provides that the activities enumerated in it are not unlawful, if the "employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work." It is to be noted at once that, unlike Secs. 303(a)(2) and 303(a)(3) (reprinted at Appendix, p. vi), which refer specifically to cer-

construction reached by the Court under it leads to results which frustrate the Congressional design to have jurisdictional disputes resolved by a determination of them on their merits,[42] and the Congressional intention to make the Board's determination of such disputes under Sec. 10(k) binding upon all parties to the dispute, including the employer.[43] Under such circumstances, it was incumbent upon the Court to look "beyond the words to the purpose of the Act".[44] It should have refused, to use its own words in another portion of its opinion, "to construe the literal language of [Sec. 303(a)(4)] in a manner which would disregard and thereby frustrate the obvious purpose and policy of the legislation involved and produce unreasonable or absurd results." (R. 1124.) In support of this principle, the Court of Appeals cited and quoted at length from the opinions of this Court in *U.S. v. American Trucking Ass'ns.*, 310 U.S. 534, and *Talbot v. Silver Bow County*, 139 U.S. 438. Its failure to apply the principle of these cases to Sec. 303(a)(4) of the Act, while applying them without warrant to Sec. 303(b) of the Act, when considering the status of the trial court in this case,[45] is indefensible. Had the Court of Appeals applied this cor-

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tifications of the Board under the provisions of Sec. 9 of the Labor Relations Act, the "order or certification" of the Board mentioned in Sec. 303(a)(4) is not made referable to a particular provision of the Labor Relations Act. This ambiguity alone belies the statement of the Court of Appeals that the language of Sec. 303(a)(4) is clear.

[42] See pp. 41-42, supra.

[43] See pp. 43-44, supra.

[44] *U.S. v. American Trucking Ass'ns*, 310 U.S. 534, 543.

[45] See pp. 77-78, infra.

rect principle to Sec. 303(a)(4), it could not have failed to hold that the conduct defined by its terms does not become actionable unless it occurs after, and in the face of, an adverse Board determination under Sec. 10(k).

In its Brief Opposing Petition for Writ of Certiorari, respondent advanced the theory that conduct within the terms of Sec. 8(b)(4)(D), standing alone, is an unfair labor practice whenever it occurs, even though the Board will dismiss a complaint charging the occurrence of such an unfair labor practice, unless the conduct in question occurs after and in noncompliance with a Board determination under Sec. 10(k). The action of the Board in dismissing the complaint, says respondent, does not mean there never was a violation of Sec. 8(b)(4)(D). The dismissal by the Board, according to respondent, is comparable to the condonement of an offense, or the refusal of an injunction because the wrongful acts have been discontinued. From this it follows, claims the respondent, that the conduct defined by the terms of Sec. 303(a)(4) is unlawful whenever it occurs.[46]

It would be idle to answer respondent's theory by engaging with it in a quibble about whether, when the Board dismisses a complaint in a case such as *Westinghouse Electric Corp.*, 94 NLRB No. 63, 28 LRRM 1058,[47] it is merely condoning an unfair labor practice already committed or holding that none was

[46]Respondent's Brief Opposing Petition for Writ of Certiorari, pp. 11-12.

[47]Discussed at pp. 30-31, supra.

ever committed. The complete answer to this contention of respondent, as to all others advanced by it, is furnished by looking again at the basic congressional purpose and design in dealing with jurisdictional disputes. Congress intended the Board under Sec. 10(k) to resolve such disputes on their merits, i.e., to arbitrate them, and further intended the Board's decision to be binding on all the parties to the dispute, including the employer. It made unions which failed to comply with such determinations of the Board, and persisted in seeking the disputed work, subject to actions for damages and cease and desist orders for such activities as occurred following the determination. If the employer refused to comply, he could not be sued for damages or forced to comply by the Board. He could, however, be picketed by the union in whose favor the Board had ruled, which union would then be immune from damage actions by the employer and cease and desist orders by the Board. Such activities, under such circumstances, were to become protected concerted activities, to use a phrase often employed in connection with the Act.[48]

The respondent's refusal to recognize the obligation of an employer to comply with a Board's Sec. 10(k) determination leads it to a view of the statute under which the only effective guarantee that an employer would so comply is removed. If, as claimed by respondent, peaceful picketing for the object defined by Sec. 303(a)(4) is unlawful and actionable whenever it occurs, then it is unlawful even though carried

[48]See pp. 37-38, supra.

on to compel an employer to comply with a determination of the Board under Sec. 10(k), and to reassign work in accordance with such award. Any compulsion upon the employer to comply is effectively removed, since he can sue the picketing union under Sec. 303 (a)(4) for any damages he may suffer. It is accordingly apparent that the theory of respondent concerning Sec. 303(a)(4) must be rejected as incompatible with the goal of the statute to have employers, as well as unions, compelled to abide with the rulings of the Board under Sec. 10(k).

Once it is seen that only such conduct as follows and is in non-compliance with the Board's determination of a jurisdictional dispute under Sec. 10(k) is actionable under Sec. 303(a)(4), it becomes clear that the trial court erred in permitting the jury to assess damages for the picketing of Local 16 which occurred prior to the Board's determination of the dispute in this case on April 1, 1949 (82 NLRB 650).[49] The judgment of the Court of Appeals affirming the award to respondent of damages for conduct that preceded the Board's determination under Sec. 10(k) was erroneous, and should be reversed and remanded, with directions that the judgment of the trial court be vacated.[50]

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[49] Under Instruction No. 5, the jury was permitted to assess damages for picketing during the period from April 10, 1948, to April 27, 1949. (Tr. 50-51.) Only 27 days of this period of more than a year followed the Sec. 10(k) determination of the Board in this case.

[50] It is impossible to segregate from the present judgment the damages to which the respondent might be entitled for the 20 odd days of picketing which followed receipt of notice by petitioners of the Sec. 10(k) determination adverse to Local 16.

II.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT FOR THE TERRITORY OF ALASKA IS A DISTRICT COURT OF THE UNITED STATES, AND THUS PERMITTED TO STAND ERROR PREJUDICIAL TO PETITIONERS.

Sec. 303(b) of the Act provides that persons injured in their business or property by reason of alleged violations of Sec. 303(a) thereof may sue therefor "in any *district court of the United States*[51] subject to the limitations and provisions of Sec. 301 hereof without respect to the amount at controversy, or in any other court having jurisdiction of the parties * * *"

The court below held that the trial court correctly proceeded on the assumption that it was a "district court of the United States".[52] This erroneous assumption of a status it did not have led the trial court into serious error which was not corrected in the court below.

A. THE DISTRICT COURT FOR THE TERRITORY OF ALASKA IS NOT A DISTRICT COURT OF THE UNITED STATES.

The phrase "district court of the United States" having for many years had a "definite and restricted meaning", *International Longshoremen's etc. Union*

[51] Italics supplied.

[52] That the trial court did so proceed is manifest from its order denying International's motion to quash service (T.R. 14, 21-22), from its order overruling petitioners' demurrer (T.R. 21-22), from the opinion it delivered in connection with the said order (*Juneau Spruce v. International Longshoremen etc.*, 83 F. Supp. 224), and from the instructions it gave to the jury on the question of agency. (T.R. 49.)

v. Wirtz, 9 Cir., 170 F. 2d 183, 185, it must be presumed that Congress intended that meaning in 1947 when it used that phrase in Sec. 303(b) of the Act. (*Old Colony etc. v. Commissioner,* 284 U.S. 552; *Deputy v. DuPont,* 308 U.S. 488; *United States v. Stewart,* 311 U.S. 60; *Shapiro v. United States,* 335 U.S. 1.)

The meaning which the phrase in question had received by 1947 excluded from its scope the district courts for the territories, including the District Court for the Territory of Alaska.

Mookini v. United States, 303 U.S. 201, considered the status of the District Court for the Territory of Hawaii (a court in many respects analogous at that time in its creation and jurisdiction to the District Court for the Territory of Alaska). The precise problem was whether the Criminal Appeals Rules promulgated pursuant to the Act of March 8, 1934, 48 Stat. 399, applied to the District Court for the Territory of Hawaii. The rules themselves provided that they were applicable to "District Courts of the United States". Although there was no "policy" reason why criminal appeals from Hawaii should be treated differently than any other criminal appeals, this Court held that the District Court for the Territory of Hawaii was not a "District Court of the United States" within the meaning of the rules.

> "The term 'District Courts of the United States' as used in the rules, without an addition expressing a wider connotation, has its historical significance. It describes the constitutional courts created under Article III of the Constitution. Courts

> of the territories are legislative courts, properly speaking, and are not District Courts of the United States. *We have often held that vesting a territorial court with jurisdiction similar to that vested in the District Courts of the United States does not make it a 'District Court of the United States'.*[53] Reynolds v. United States, 98 U.S. 145; In re Mills, 135 U.S. 263; McAllister v. United States, 141 U.S. 174; Stephens v. Cherokee Nation, 174 U.S. 445; Summers v. United States, 231 U.S. 92; United States v. Burroughs, 289 U.S. 159." (303 U.S. 201, at 205.)

This decision was applied to the District Court of the Panama Canal Zone in *Schackow v. Canal Zone,* 5 Cir., 104 F. (2d) 681, and was substantially followed as far as the District Court of Puerto Rico is concerned in *Puerto Rico etc. v. Colom,* 1 Cir., 106 F. (2d) 345. See, also, *Balzac v. Porto Rico,* 258 U.S. 298.

The cases directly involving the District Court for the Territory of Alaska indicate a similar result.

The first case on the question of the nature of the court in Alaska is *McAllister v. United States,* 141 U.S. 174. This case arose on the petition of McAllister, who had been appointed a judge of the District Court for the Territory of Alaska, to recover his wages after his removal from office by the President. He relied upon Rev. Stat. 1768, which provided that judges of the "courts of the United States" could

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[53] Italics supplied.

not be so removed. Again, although no reason of "policy" suggested itself for distinguishing a federal judge sitting in Alaska from one sitting within the territorial limits of the nation, and *although the Alaska court had the same jurisdiction as a district court of the United States,* this Court held that the District Court for the Territory of Alaska was not a "court of the United States" within the meaning of the revised statute in question, and consequently the claim for the payment of salary was denied.[54]

Thus, when Congress used the phrase "district court of the United States" in Sec. 303(b), it was using a term having a definite and fixed meaning, which excluded from its purview the District Court for the Territory of Alaska as well as certain other territorial courts. As a matter of fact, it is probable that Congressional realization that the phrase did not embrace these territorial courts motivated the conferring of jurisdiction upon "any other court having jurisdiction of the parties." Thus in those territories where there was not a "district court of the United States", the remedies provided by Sec. 303 could be enforced in the territorial courts of general jurisdiction.[55]

There are many examples from Congressional legislation which demonstrate that over the years Congress

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[54]To the same effect with respect to the Alaska court, see *In re Cooper*, 143 U.S. 472; *Coquitlam v. United States*, 163 U.S. 346, and *Carscadden v. Territory of Alaska*, 9 Cir., 165 F. (2d) 377.

[55]However, as we will indicate below, there are substantial differences with respect both to procedure and substance, depending on the court in which the action is brought.

has been aware of the distinction between courts in the territories and those which are truly "district courts of the United States". An example will suffice to make the point here.

In 1946, just one year before it enacted the statute here in question, when Congress desired to apply the Federal Rules of Criminal Procedure to the courts in the territories, it specifically so stated. In 18 U.S.C.A. [Old] 687, it provided that the Supreme Court should have the power to prescribe rules of criminal procedure "in District Courts of the United States, including District Courts of Alaska, Hawaii, etc., etc." And Rule 54(a)(1) of the Federal Rules of Criminal Procedure specifically provided that the Rules applied to all criminal proceedings "in the District Courts of the United States, which include the District Courts of the United States for the District of Columbia, the District Court for the Territory of Alaska, the United States District Court for the Territory of Hawaii, etc., etc."

With this statutory and case background, it is perfectly apparent that had Congress intended the trial court to have jurisdiction over suits brought under Sec. 303 of the Act as a district court of the United States, it would not have used the phrase "any district court of the United States" without more. On the contrary, it would have said, as it did in the other situations referred to above, "any District Court of the United States, including the District Court for the Territory of Alaska, etc., etc."

The failure to make a specific reference to the District Court for the Territory of Alaska can only mean, in view of the foregoing, that Congress did not intend that court to have jurisdiction of suits brought under Sec. 303 as a district court of the United States.

Perhaps the most definitive illustration of this point is to be found in the new Judicial Code adopted in 1948, just one year after the passage of the Taft-Hartley Act. There Congress had an opportunity most carefully to review the entire judicial structure of the United States and to define what it meant by the terms which had been used in the legislation and court decisions throughout the years. Clearly, by the adoption of the new Title 28, Congress did not intend, except where it specifically so stated, to create any new or different law from that which had previously obtained, but intended only to revise, recodify and clarify a pre-existing law concerning the judiciary of the United States.

Chapter 5 of Title 28 is captioned: "District Courts". Sections 81 through 131 contained in Chapter 5 create the judicial districts of the United States. In addition to the judicial districts within the continental limits of the United States (i.e., in the forty-eight states), judicial districts are there created for the District of Columbia (28 U.S.C. 88), Hawaii (28 U.S.C. 91), and Puerto Rico (28 U.S.C. 119). *No judicial district is created for Alaska.*

Section 132 of Title 28 provides:

> "There shall be in each judicial district a district court, which shall be a court of record known as the United States District Court for the district."

Since there is no judicial district created for Alaska, the court in Alaska cannot be a district court of the United States within the meaning of Sec. 132 of Title 28.

Section 451 of Title 28 defines the phrase with which we are here concerned, i.e., "district court of the United States", as "the courts constituted by Chapter 5 of this title." This obviously does not include the District Court for the Territory of Alaska. Similarly, 28 U.S.C. 610, in defining the broader term "courts", distinguishes between "District Courts of the United States" on the one hand, and "the District Court for the Territory of Alaska" and certain other territorial courts, on the other.

The revisers of the Judicial Code expressly recognized what they were doing with respect to the District Courts in the District of Columbia, Hawaii and Puerto Rico.

The Reviser's Note to Sec. 88, *supra,* which created the judicial district for the District of Columbia, says:

> "This section *expressly* makes the District of Columbia a judicial district of the United States."

The Reviser's Note to Secs. 1291 and 1292 states:

> "The District Courts for the districts of Hawaii and Puerto Rico are embraced in the term 'Dis-

trict Courts of the United States' (see definitive section 451 of this title)."

This Court has relied upon these very Reviser's Notes to assist it in determining the nature of the District Court in Hawaii (*Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, at 376, Footnote 12) and has indicated that the Alaska court stands on a different footing (*ibid.*, at 376, Footnote 11).

Furthermore, the Reviser's Notes state that 28 U.S.C. 91, dealing with Hawaii, is based upon Secs. 641 and 642(a) of Title 48 U.S.C. and that 28 U.S.C. 119, dealing with Puerto Rico, is based upon Secs. 863 and 864 of Title 48 U.S.C. These sections of 48 U.S.C. which had to do with the courts in Hawaii and Puerto Rico were incorporated into the new Title 28 in 1948 and were for that reason repealed by Sec. 39 of the Act of June 25, 1948, Chapter 646, which enacted the new Judicial Code.[58]

However, those provisions of Title 48 which have to do with the District Court for the Territory of Alaska (48 U.S.C.A. 101, *et seq.*), the court in the Canal Zone (48 U.S.C.A. 1344 *et seq.*), and the courts in the Virgin Islands (48 U.S.C.A. 1405, *et seq.*), have not been repealed since they were not placed in the new Judicial Code as were the analogous sections dealing with the District of Columbia, Hawaii and Puerto Rico.

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[58]See pages 1668 and 1683, respectively, of the paper-bound (1948) edition of Title 28.

In adopting the new Judicial Code, Congress did not overlook the Territorial Courts in Alaska, the Canal Zone or the Virgin Islands by inadvertence. The Judicial Code—i.e., Title 28—is, technically speaking, Sec. 1 of the Act of June 25, 1948, Chapter 646. Sections 9 to 13 *of that act* (not of Title 28) are amendments in various particulars of sections of 48 U.S.C. dealing with the District Court for the Territory of Alaska; similarly, Sec. 31 of that act is an amendment to the Canal Zone code (48 U.S.C. 1353) dealing with the court in the Canal Zone; and Secs. 28 and 30 of that act are amendments to sections of 48 U.S.C. dealing with the court in the Virgin Islands.

Thus it is clear that in 1948, only one year after the passage of the Taft-Hartley Act, while Congress in enacting the Judicial Code changed the prior status of the District Courts for the District of Columbia, the Territory of Hawaii, and Puerto Rico, and made them "district courts of the United States", it deliberately did not make such a change in the status of the District Courts for the Territory of Alaska, the Canal Zone, or the Virgin Islands.[57]

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[57] Other evidence that Congress recognized that the Alaska court occupied a different status from that of a "district court of the United States" is to be found in the following Reviser's Notes to Title 28:

(a) Secs. 501, 502, 504 which deal with United States attorneys:

"Words 'including the District of Columbia' were omitted, because the District of Columbia is made a judicial district by section 88 of this title." (501)

"The exception of Alaska * * * was omitted as covered by section 109 of Title 48, U.S.C., 1940 ed., Territories and Insular possessions * * *" (502)

"Reference to the territories * * * was also omitted as covered by the provisions of Title 48, U.S.C., 1940 ed., Territories and

Why Congress chose to leave the Alaska court in the same status as the courts in the Canal Zone and the Virgin Islands is a question that we cannot answer. But the fact is crystal clear from an examination of the legislation that that is exactly what Congress did. The wisdom or lack of wisdom in making these classifications and in grouping the Alaska court with the courts of the other two territories, while giving a full-fledged district court status to the courts in Hawaii, the District of Columbia, and Puerto Rico, is something for Congress to determine.

It is not for this or any other court to modify or change the status or nature of the Alaska court (*Bate*

Insular possessions. See sections 109 and 112 of such title applicable to United States attorney in Alaska, and 1353 applicable in the Canal Zone, and 1405y applicable in the Virgin Islands." (504)

(b) Secs. 541, 542, 545 which deal with United States marshals, and contain substantially the same provisions as those just referred to.

(c) Secs. 631 and 633 which deal with United States Commissioners:

"This revised section by its terms limits the section and Chapter 43 of this title to commissioners appointed by a 'district court' which includes the courts enumerated in chapter 5 of this title but not those of Alaska, Canal Zone or Virgin Islands." (631)

"The words 'in each judicial district' limit the section to the commissioners in the districts enumerated in chapter 5 which includes Hawaii, Puerto Rico and District of Columbia but omits Alaska, Canal Zone, and Virgin Islands." (633)

(d) Sec. 751 which deals with District Court clerks:

"Provision for similar offices in Alaska, Canal Zone, and the Virgin Islands is made by sections 106, 1349 and 1405y, respectively, of Title 48, U.S.C., 1940 ed."

See also 28 U.S.C. 753 where, when Congress wanted to have the courts in the territories as well as the district courts appoint court reporters, it provided as follows:

"(a) Each district court of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District

Refrigerating Co. v. Sulzberger, 157 U.S. 1; *Commissioner v. Gottlieb*, 265 U.S. 310; *Kalb v. Feuerstein*, 308 U.S. 433; *United States v. Cooper Corp.*, 312 U.S. 600), which the foregoing shows was not a district court of the United States in 1947 when the Taft-Hartley Act was passed, and which is not such a court today. There can be no question whatsoever that the District Court for the Territory of Alaska never was, and is not now, a "district court of the United States", within the meaning of Sec. 303 of the Act.

None of the grounds relied upon by the courts below to justify their contrary conclusion are tenable.

Court of the Virgin Islands shall appoint one or more court reporters."

Compare the Reviser's Note to the foregoing section with the Reviser's Notes heretofore referred to.

Finally, see the Senate Report on Title 28—i.e., Senate Report 1559, 80th Congress, 2d Session—wherein is discussed an amendment to the House version of Title 28 with respect to jurisdiction over suits against the United States. In the House version the section which is now 28 U.S.C. 1346(b) gave such jurisdiction to "district courts *including the district courts for the Territories and Possessions of the United States.*" The Senate struck out the italicized words and amended the phrase to give jurisdiction to "the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands."

In explaining this amendment the Senate Report stated that it was necessary to conform the section taken from the Tort Claims Act to the revision in which the courts in at least two territories or possessions—Hawaii and Puerto Rico—are included, by virtue of 28 U.S.C. 451, in the term "district court".

> "The district courts for Hawaii and Puerto Rico therefore need not be specifically referred to. On the other hand in at least one of the possessions there are local district courts which are not intended to have tort-claim jurisdiction but which would be included by the general terms of the language which the amendment strikes out. The specific inclusion of the courts of the three remaining territories and possessions thus makes for clarity and precision."

See pages 1680-1681 of the paper-bound (1948) edition of Title 28.

In the first place, while the trial court recognized that the phrase "district court of the United States" without more does not mean the territorial courts, and while it cited *International Longshoremen's etc. v. Wirtz*, 9 Cir., 170 F. (2d) 183 (83 F. Supp. 224, at 225), it suggested that to apply this definition here would lead to difficulties in the enforcement of the statute in other respects (*ibid.*, at 226). It said, for example, that the power of the Board to apply for injunctive relief under Sec. 10(l) of the Labor Relations Act[58] or to seek enforcement of an order while the Circuit Court is in vacation, under Sec. 10(e),[59] might be hindered or embarrassed by applying the definition of the phrase required by the authorities. The difficulty with this argument, assuming it is applicable to the case at bar, is that it calls upon the judiciary to correct *supposed* gaps left, or errors made, by the legislature. This, of course, is not a judicial function. If the application of the proper definition of the phrase used in the Act leads to the difficulty suggested, the remedy, of course, is to apply to the legislature for redress.

In *Bate Refrigerating Co. v. Sulzberger*, this Court said:

> " 'Where the language of the act is explicit,' this court has said, 'there is great danger in departing from the words used to give an effect to the law which may be supposed to have been designed by the legislature * * * It is not for the court to say,

[58]This section is found in Title I of the Act and not in Title III, wherein is contained Sec. 303.

[59]This section is also found in Title I.

where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.' Denn v. Reid, 10 Pet. 524, 527." (157 U.S. 1, at 37.)

In *United States v. Cooper Corp.*, the Court said: "But it is not our function to engraft on a statute additions which we think the legislature logically might or should have made." (312 U.S. 600, at 605.)

In the second place, the trial court was concerned lest the definition urged upon it would preclude the respondent or persons similarly situated from any relief whatsoever. (83 F. Supp. 224, at 226.) It apparently feared that if it applied the correct definition and held that it was not a district court of the United States, the suit would have had to be dismissed and that no relief could have been obtained in Alaska (and presumably in other territories if the suit arose there). Again, if true, that is a matter properly to be addressed to the Congress and not to be remedied by judicial tampering with the legislation. However, Sec. 303(b) gives jurisdiction not only to district courts of the United States but also to any other court having jurisdiction of the parties, and clearly the Alaska court,[60] assuming it had jurisdiction of the parties, could have proceeded with the suit on the basis of the latter proviso.[61]

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[60] Cf. *Coquitlam v. United States*, 163 U.S. 346.

[61] In such a case, however, there would be a substantial difference in both the substantive law applicable and the procedure to be followed, as we shall point out below.

It is not unusual for Congress to create a cause of action and place its enforcement in different forums where different rules of procedure as well as substantive law may apply. Examples come readily to mind. A seaman may elect to sue under the Jones Act[62] in the state or federal court,[63] and if in the latter, either at law or in admiralty,[64] and depending upon his election, different rules of procedure will govern his cause.[65] Damage actions for violations of price and rent control statutes[66] also may be brought in either forum and different rules are applicable.

So, here, the action may have been maintained in the trial court not as in a district court of the United States—for it was not that—but as in any other court having jurisdiction over the parties—assuming it did have such jurisdiction. Thus the fear that appellee would have had no forum within which to maintain its suit is not well-founded, since the trial court is the court of general jurisdiction for the Territory of Alaska. (48 U.S.C. 101.)

The Court of Appeals felt that in order to answer the contention made by petitioner that the trial court was not a district court of the United States, it was necessary to inquire "into the extent and nature of the jurisdiction conferred upon that court by Congress when it established the court as a district court

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[62] 46 U.S.C.A. 688.

[63] *O'Donnell v. Great Lakes, etc.*, 318 U.S. 36; *Garrett v. Moore-McCormack Co.*, 317 U.S. 239; *Engel v. Davenport*, 271 U.S. 33.

[64] *Rogosich v. Union Drydock & Repair Co.*, 3 Cir., 67 F.2d 357.

[65] *Pacific SS Co. v. Peterson*, 278 U.S. 130.

[66] 50 U.S.C.A. App. 925(c), *et seq.*

for the District of Alaska". (R. 1116-1117; 189 F. 2d 177, 182.) Having satisfied itself that the District Court for the Territory of Alaska had had conferred upon it the same jurisdiction as that conferred upon districts courts of the United States, the Court of Appeals concluded that the District Court for the Territory of Alaska was in fact a district court of the United States.

The difficulty with this position is that it has repeatedly been held that the mere grant of a district court's jurisdiction to a territorial court does not make the latter a district court of the United States.

In *United States v. Burroughs*, 289 U.S. 159, this Court had occasion to consider the application of the Criminal Appeals Act of 1907, which used the phrase "district court", to the Supreme Court of the District of Columbia. It was argued there that the District of Columbia court was a "district court" because it had been vested with the same jurisdiction as district courts of the United States. The argument was rejected.

> "But vesting a court with 'the same jurisdiction as is vested in district courts' does not make it a district court of the United States. This has been repeatedly said with reference to territorial courts. Reynolds v. U. S., 98 U.S. 145; Stephens v. Cherokee Nation, 174 U.S. 476; Summers v. U. S., 231 U.S. 92". (289 U.S. 159, at 163.)

This Court pointed out very clearly that the Criminal Appeals Act "employs the phrase 'district courts,' not 'courts of the United States,' or 'courts

exercising the same jurisdiction as district courts.'" (289 U.S. 159, at 163.)

So here, Sec. 303(b) employs the phrase "district courts of the United States," not "courts of the United States" or "courts exercising the same jurisdiction as district courts" or any other such phrases.

The mere fact, therefore, that a territorial court is vested with the same jurisdiction as a district court of the United States, does not make the territorial court a district court of the United States.

What the court below has done is to rewrite the statute in the manner which it believes would be more orderly and logical. However, the language of the statute is clear, and, as we have pointed out above, there is not room or occasion for judicial legislation.

Finally, the court below is guilty of a real inconsistency on this point. In its consideration of the question now under discussion, it takes the liberty to depart from the literal language of the statute and to read the statute in a manner which it thinks is designed to provide a logical and reasonable application. Unquestionably it is indulging in its own predilections on this score. Yet when it considers the issue raised by Point I in the Argument above, it rejects the argument advanced by petitioners that the purpose of Congress and logic and reason require that there be a determination by the Board under Sec. 10(k) before a cause of action under Sec. 303(a)(4) can arise, and it states that it must reject that argument because "no such limitation appears expressly in Section 303(a)

(4)". (R. 1129; 189 Fed. 2d 177, 187.) Thus it is seen that on the one hand the Court below misapplies a rule of statutory construction to read the words "district court of the United States" so as to include a court which clearly was never a district court of the United States; on the other hand, it applies a rule of narrow statutory construction to reach a result clearly at variance with the express intention of Congress.

B. AS A RESULT OF MISCONCEIVING THE STATUS OF THE TRIAL COURT, THE COURT BELOW PERMITTED TO STAND ERROR PREJUDICIAL TO PETITIONERS CONCERNING MATTERS OF JURISDICTION, SERVICE AND AGENCY.

The foregoing has demonstrated, we think, beyond any question that the trial court is not a district court of the United States. The error of the courts below in this regard was not a mere abstract or academic one but resulted in serious prejudice to petitioners. Since the trial court was not a district court of the United States, the limitations and provisions of Sec. 301 of the Act were not applicable to this cause. This conclusion is impelled by a reading of Sec. 303(b), which provides that suits under Sec. 303(a) may be maintained either in the district courts of the United States or in any other court having jurisdiction of the parties. It is only in connection with the first group of courts—i.e., district courts of the United States—that the statute makes the limitations and provisions of Sec. 301 applicable.[67]

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[67] Sec. 303(b) reads:

"* * * *in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount at controversy*, or in any other court having jurisdiction of the parties * * *" (Italics supplied.)

The limitations and provisions we discuss directly below. In effect, they gave the "district courts of the United States", referred to in Sec. 303(b) broader jurisdiction over non-resident labor unions, made service of the process of such courts upon non-resident unions easier, and authorized broader concepts of agency in such courts, than would otherwise obtain.

But since the trial court was not such a court, it had jurisdiction over the International only by virtue of either the common law or the statutory law of Alaska. Similarly, if service was properly effected upon the International, it was so effected only by virtue of the common law or the statutory law of Alaska. And finally, the agency relationships between the alleged officers of the two labor organizations and their alleged principals, had to be determined by the common law or the statutory law of Alaska.

In each instance, however, the trial court applied the provisions of Sec. 301 and in each instance those provisions were detrimental to the petitioners. On each issue the common law or the Alaska law was more favorable to petitioners.[68]

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[68]That the extension of jurisdiction over non-resident associations, the greater ease of service thereon, and the broader scope of agency doctrine was limited by Congress in actions under Sec. 303(b) to cases in United States district courts and not extended to "other courts", gives respondent no cause for complaint. It may well be that Congress, recognizing that such extensions were novel and opened the door to grave abuses to the detriment of trade unions, decided that it did not want to permit the extended doctrines to be applied and administered by any but judges of the United States district courts—judges in whose competence and ability Congress presumably had greater faith than it might have had in judges of "any other court", since it had more knowledge of those men than of other judges.

The limitations and provisions of Sec. 301 which the court applied are substantially as follows: Sec. 301(b) provides that a labor organization shall be bound by the acts of its agents, *and that it may be sued as an entity.* Sec. 301(c) provides that the district courts of the United States shall have jurisdiction over labor organizations in the district in which *they maintain their principal office,* or in the district in which *their duly authorized agents* are engaged in representing employee members. Sec. 301(d) provides that the service of process upon an officer or *agent* shall constitute service upon the labor organization. Sec. 301(e) provides that in determining whether any person is acting as an agent, *the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.*

Even superficial examination of these provisions of Sec. 301 indicates how broadly they have extended the rules with respect to jurisdiction, service and agency. A comparison of those provisions with the common law or Alaska statutes on the subject demonstrates that in this particular case the error committed by the trial court was very significant.

1. As to jurisdiction.

The trial court assumed jurisdiction over the International despite the fact that it maintained no office in Alaska and that its principal place of business was in California (Pl. Exh. 19, par. 5, R. 12; R. 273), upon the ground that it had an "International Representative" employed by it in Alaska

who was there representing its employee members. This assumption of jurisdiction was clearly based upon Sec. 301(c) and upon nothing else. Since, as we have shown, Sec. 301(c) does not apply, the trial court could acquire jurisdiction over the International only if the common or statutory law of Alaska provided therefor.

Addressing ourselves first to the narrow question of whether a labor organization can be sued as an entity in Alaska, we point out first that at common law there was no jurisdiction in any court to entertain such a suit. *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344. In a most recent collection of authorities on the subject, it is stated:

> "It is a well established rule that at common law, in the absence of an enabling or permissive statute, an unincorporated voluntary association is not capable of being sued in its common or association name, for the reason that such an association, in the absence of statutes recognizing it, has not legal entity different from that of its members." 149 A.L.R. 508, at 510.

While the decision of this Court in the *Coronado Coal* case modified the common law rule insofar as district courts of the United States are concerned, it did not do so for the courts of the Territories.

However, irrespective of the question of whether the Alaska court has jurisdiction over any unincorporated labor organization as an entity, the question here, at least so far as petitioner International is concerned, is whether it has jurisdiction over such

a labor organization *which is a non-resident of the Territory of Alaska and which maintains no place of business there.*

The attempt of the trial court to assert jurisdiction over the International which was (as to it) a non-resident, unincorporated association, raises serious constitutional questions in addition to those already discussed. In *Flexner v. Farson,* 248 U.S. 289, this Court held that a Kentucky statute providing that jurisdiction could be obtained over a foreign partnership or association upon a cause of action arising from business done in the state, by serving the agent of such partnership or association residing in the state, was unconstitutional. The statute was held to have violated the due process clause of the Fourteenth Amendment.

This case has been followed by the highest courts of a number of states, all of which invalidated similar statutes in their own states.[69] The doctrine of the *Flexner* case has been qualified in later cases but the basis of the qualification lies in the nature of the business of the foreign partnership or association over whom jurisdiction is sought to be asserted. *Doherty & Co. v. Goodman,* 294 U.S. 623, upheld the constitutionality of an Iowa statute which provided that a non-resident association *conducting an office* in Iowa could be served by serving an agent employed in such office, *in all matters growing out of or connected with*

[69] *Woodfin v. Curry,* 228 Ala. 436; *Andrew Bros. v. McClanahan,* 220 Ky. 504; *Victor Corville etc. v. R. G. Dunn & Co.,* 153 La. 1078; *Knox Bros. v. Wagner & Co.,* 141 Tenn. 348.

the business of that office, provided that the business conducted was of a special nature *subject to special regulation by the state.*[70]

The principle which these cases establish is that at common law no foreign association could be subjected to the jurisdiction of a forum simply by service upon an agent doing business within the state. If a specific statute provides for such an assertion of jurisdiction, then such a statute will be upheld if the foreign association maintains an office in the state, if the cause of action arises out of the business of that office, and if the business in question is subject to special regulation by the state.

A thorough perusal of the three volumes of the Alaska Compiled Laws, Annotated (1948), reveals no statute of the territory which authorizes service upon a non-resident association, and none was cited in the opinion of the court below.

Accordingly, as to the International, the judgment here must be reversed either because it can be stated at once that Alaska could not have acquired jurisdiction over the person of the International under the cases cited above; or as to both petitioners, because the Alaska court failed to rule on whether or not under its law, jurisdiction could have been obtained

[70]These qualifications are not present in this case. The International did not conduct an office in Alaska. The action did not grow out of, nor was it connected with, the business of any such office. We shall point out immediately below that there in fact is no Alaska statute akin to the Iowa statute involved in the *Doherty* case.

over them. Its reliance upon Sec. 301(c) in the place of its own law was clearly defective.

2. As to service.

Connected closely with the question just discussed is the question of service. Here, again, the trial court held that service was properly effected upon the International by service upon its alleged "International Representative". The validity of this service was dependent solely upon the provisions of Sec. 301(d) and (e), and this reliance, as we have already pointed out, was not well founded.

Even under those sections process upon a non-resident International Union was vacated under circumstances described by the court as follows:

> "The defendant does not have an office or a representative in New York. *The defendant's local in New York is an autonomous body and defendant may not intervene or interfere in its affairs except when the local reaches an impasse on its relations with an employer,* and then only at the request of the local. When such a request is made, the defendant sends its representative to the district *merely to assist the local and the employer in arriving at an agreement.*" (Italics added.) *Daily Review Corp. v. International Typographical Union,* 9 F.R.D. 295 (E.D. N.Y.).

In granting a motion to vacate service, the court said:

> "It appears that the defendant's constitution and by-laws require that its principal office be located in Indianapolis, Indiana; that all of its books,

records, etc. be kept there; that its funds be deposited in Indianapolis banks and that its officers reside there.

"By reason of the foregoing I find that the defendant is not doing business in New York. Philadelphia and Reading Ry. Co. v. McKibin, 243 U.S. 264, 265; Danega Inc. v. Lincoln Furn. Mfg. Co. Inc., 29 F. 2d 164; Amtorg Trading Corp. v. Standard Oil of California, 47 F. Supp. 466."

Daily Review Corporation v. International Typographical Union, 9 F.R.D. 295 (E.D. N.Y.).

In the case at bar the constitution of the International (Pl. Exh. 3, R. 136-276) and the affidavits of Verne Albright (R. 8-14) and Germain Bulcke (R. 16-18) demonstrate that the International maintains its principal office and place of business in San Francisco, that all of its books, records, accounts, and monies are kept there, and that none of its officers reside in Alaska. Thus the reasoning of the decision in the *International Typographical* case, *supra,* in which case the provisions of Sec. 301 were concededly applicable, compels a similar conclusion here where the broad provisions of Sec. 301 are not applicable. The International's motion to quash service should have been granted.

3. As to agency.

The error which the trial court fell into concerning the laws of agency stem, as do the other two errors discussed, from its misconception of its own status

and consequently its unjustified application to this cause of the provisions of Sec. 301. The error is most pronounced in the instruction to the jury on the question of agency. (R. 49.) This instruction is framed entirely upon the theory of Sec. 301(e) and specifically informs the jury that the question of whether the specific acts performed were actually authorized or subsequently ratified is not controlling. Since the evidence fell short of showing as a matter of law that the International either authorized or subsequently ratified the acts complained of, this instruction was highly prejudicial to the International.[71]

The ordinary rules of agency, of course, require either prior authorization or subsequent ratification. (*Restatement of Agency*, Secs. 1, 15, 26, 82, 140, 212, 215.) In the absence of either, the principal cannot be bound by the acts of his agent.

Since the trial court was not a "district court of the United States," it erred in applying to this case the provisions of Sec. 301 of the Act. That error led it into an assumption of jurisdiction over the International which it did not have, into an acceptance of a purported service upon the International which was not a valid service, and finally, into an application of the cause (in its instruction to the jury) of rules of agency which were not applicable and which were

[71] Even if there was some evidence of participation by agents of the International, the question of whether this constituted "authorization" or "ratification" should have gone to the jury as a question of fact (Cf. *United Brotherhood etc. v. United States*, 330 U.S. 395, at 409-410), under appropriate common law agency instructions. 2 *Am. Juris.* 349 *et seq.*, and cases there cited.

prejudicial to both the International and Local 16. For each of these reasons, the judgment below must be reversed.

III.

THE FAILURE OF THE RESPONDENT TO OBSERVE ITS DUTY UNDER THE ACT TO ATTEMPT TO SETTLE THE DISPUTE SHOULD HAVE BEEN CONSIDERED AS A DEFENSE TO ITS ACTION, OR IN MITIGATION OF DAMAGES.

Within the framework of its erroneous conception of the elements essential to constitute a cause of action under Sec. 303(a)(4), and of its status as a court, the trial court committed an additional error which requires the reversal of its judgment. The trial court refused to give petitioners' requested instructions numbers 1, 2, 12 and 13 to the jury.[72] These instructions stated the general purposes and policies of the Act, as well as the duties of employers and unions involved in labor disputes to make reasonable efforts to settle them, and to employ the mediation and conciliation services of the Federal Government in such disputes. By the instructions, petitioners proposed to tender to the jury as an issue for its consideration the effect of the conduct of respondent on its right to recover damages. By refusing to give these instructions, the trial court ruled that the conduct of the respondent in the dispute could neither constitute a defense to the action against petitioners nor be considered in mitigation of damages.

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[72] Appendix, pp. i to iv.

It is submitted that this ruling of the trial court was erroneous, and prejudiced petitioners. If the respondent's own wrong-doing caused the petitioners' activities, the respondent had no right to recover. "No one may take advantage of his own wrong." (*In re F. P. Newport Corp.*, 9 Cir., 98 F. (2d) 453.)

The record shows that the respondent's own wrong-doing caused the acts of which it complained. Early in August, 1947, Eugene S. Hawkins, General Manager of respondent, had promised Albright, who represented the longshoremen, that if Local 16 and Local M-271 reached an agreement concerning the work to be done for respondent by the longshoremen, the respondent would be perfectly agreeable to such an arrangement. (R. 181-182.) The respondent repudiated this commitment when it rejected, early in April, 1948, the adjustment which had been reached between the two locals. The cross-examination of Hawkins on the matter reads as follows:

> "Q. Later on you had a number of meetings with representatives of Local 271 and Local 16 in which Local 271 asked you to turn that work over, namely the loading of the lumber, to Local 16; isn't that true?
>
> A. Yes.
>
> Q. And you still said that you couldn't do so because you had assigned that work to Local 271 which was now asking you to turn the work over to Local 16. Is that the position you took then?
>
> A. Yes.
>
> Q. At this time if your sole reason for not assigning this work to Local 16 was because you

had turned it over to 271 and 271 asked you to turn it over to 16, your contention was no longer tenable; isn't that true?

A. Yes—that wasn't the sole and only reason that developed.

Q. You found another reason?

A. Another reason had been developed by that time.

Q. You never mentioned that reason either to representatives of 271 or of 16, did you?

A. I don't recall any specific instance; no." (R. 238-239.)

The additional reason referred to by Hawkins was totally unrelated to the cost of respondent's operations. (R. 257.) It was described by Eugene H. Card, the respondent's Labor Relations Advisor (R. 297) as follows:

"Q. What is the Company's objection to hiring longshoremen to load barges?

* * * * * * *

A. Because we have an agreement with another union under which that work is covered. We can't break our agreement with the I.W.A. and take the work away from them and give it to somebody else just because they come along and ask for it." (R. 306.)

"Q. Did you have any objection to making two contracts, with two organizations?

A. Yes, of course.

Q. What were the reasons for it?

A. You can't take work away from one group of men and give it to somebody else.

* * * * * * *

Q. If you took the work away—did it make any difference to you who did the work? Who did you want to do the work?

Mr. Andersen. That is a complex question.

Q. Did it make any difference to the company?

A. It made a difference in this respect; yes. We couldn't permit the I.W.A. to violate their agreement any more than they would permit us to violate ours.

Q. Of course people can call off an agreement if they want to?

A. Yes.

Mr. Andersen. I object.

Q. Why were you unwilling to void the agreement with the I.W.A. and draw up another excluding barge work?

A. If we had let the agreement go then and sign with the longshoremen, the next day some other union would be down and say, 'We want an agreement covering machinists,' or, 'We want an agreement covering painters,' or, 'We want an agreement covering carpenters.' We weren't just going to open road to everyone in the Territory coming in and covering small groups of people.

Q. Was there any other reason you can think of now?

A. None that I know of; no." (R. 309-310.)

The refusal of respondent to live up to its word was totally uncompromising. Leonard Evans, the Alaska representative of the United States Department of Labor (R. 985), who had been assigned to attempt to conciliate the dispute (R. 986), was informed by

Hawkins that the respondent would close the plant down rather than deal with the longshoremen. (R. 988-989.) This unyielding attitude of the respondent put an end to negotiations which quickly could have settled the entire dispute. The testimony of Evans reveals the following:

> "A. * * * I tried to get a meeting of the representatives of the sawmill, representatives of the Company and representatives of the Longshoremen.
>
> Q. Were you successful in getting Mr. Hawkins to agree to such a conference?
>
> A. Either then or later I was successful in getting the three parties to meet for a very short time in the Commissioner of Labor's office.
>
> Q. When was that?
>
> A. If I remember right, it was a Friday afternoon.
>
> Q. About when?
>
> A. In the same week.
>
> Q. Were your conciliations successful then or unsuccessful?
>
> A. When we left I was hopeful. We had scheduled a second meeting for the following Monday. All three parties at that time indicated they would all show up. On Monday the Company representatives didn't show up. When I phoned to remind them they said 'No soap—no meeting.'
>
> Q. That is, they refused to meet, did they?
>
> A. Yes." (R. 990-991.)

In addition, the record was uncontradicted that the respondent knew that if it had kept the commitment it

had made to observe the understanding reached between Local 16 and Local M-271, the mill would have continued to operate. Hawkins testified as follows on cross-examination:

"Q. And from that point on all they requested was that you turn the work over to them from the bull rail out; that is correct, isn't it?

A. From the bull rail out; yes.

Q. But of course you insisted that the I.W.A. continue to do the work; isn't that correct?

A. Yes.

Q. And despite the fact that four men would only be used part time, you shut down the mill rather than hire these two or four longshoremen; is that true?

A. No.

Q. You didn't give the work to the longshoremen?

A. We didn't shut down the mill——

Q. You didn't give the work to the longshoremen?

A. No.

Q. You knew, if you gave the work to the longshoremen, all the men would return to work and the mill would function at full blast, didn't you?

A. Yes, I presume." (R. 270-271.)

In the light of the public policy of the Act with respect to the settlement of labor disputes, the Jury should have been permitted to consider this breach by the respondent of its previous commitment and its uncompromising refusal to negotiate a settlement. It might well have concluded that the respondent's own

wrongdoing, under the terms of the very statute upon which it relied for relief, should defeat its right to recover, or at the very least, diminish the damages to which it otherwise might be entitled.

Since respondent's cause of action was for an alleged statutory tort, the rule of diminution of damages was applicable. That rule is given by the *Restatement of Torts* as follows:

> "Sec. 918. Avoidable Consequences.
>
> "(1) Except as stated in Subsection (2), a person injured by the tort of another is not entitled to recover damages for such harm as he could have avoided by the use of due care after the commission of the tort.
>
> "(2) A person is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended such harm or adverted to it and was recklessly disregardful of it, unless the injured person with knowledge of the danger of such harm intentionally or heedlessly failed to protect his own interests."

By substituting the statutory duty of the respondent (to bargain in good faith and to utilize fully the Conciliation Service of the Federal Government), for the "due care" referred to in the Restatement section, the requested instructions would have submitted the Restatement rule to the jury. Further, irrespective of the statutory policy, the respondent's duty to mitigate damages might well have included an obligation to comply with the request of Local 16 and Local

M-271 concerning its barge loading, and thus prevent the closing of its mill, pending a final settlement of the dispute. An analogous situation occurred in *Alcoa Steamship Co. v. Conerford,* 25 LRRM 2199 (D.C. S.D. N.Y. 1949). There, stevedoring and steamship companies sued local unions of longshoremen[73] for breach of contract, under the provisions of Sec. 301 of the Act.[74] The breach consisted of the refusal of the longshoremen's unions to furnish gangs of men to load or unload vessels unless the number of men to be employed in the hold of each vessel was restricted to eight. The court's opinion was concerned solely with the question of the amount of damages to which the various plaintiffs were entitled, it being conceded that the collective bargaining contract had been breached. In considering the specified damages claimed by one plaintiff to have arisen from a six-day work stoppage by the longshoremen, the court stated:

> "It can be seen that Cunard did not follow the practice of the Cuba Mail Co. and permit the loading of the ships with eight men in the hold once it became clear that no longshoremen would work if more than eight were demanded. Instead, it allowed six days to elapse in which no work

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[73]The defendants there were affiliated with the International Longshoremen's Ass'n (AFL), with which petitioners have no connection.

[74]The pertinent portion of Sec. 301 reads as follows: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." (29 U.S.C. Supp. (1949), Sec. 185.)

was done. This upset the carrier's schedules and caused the damages to mount. Nederlandsch Amer. S.M. v. Stevedores' and L.B. Soc., 265 Fed. 397, E.D. La. 1920, is authority for the proposition that in such a situation the steamship company is under a duty to mitigate damages. I find that it was not unreasonable for Cunard Limited to wait until August 22, 1947, before undertaking the loading of the SS. Port Melbourne and the SS. Sibley Park in an effort to induce Local 791 to comply with the contract. But in view of the known imminent arrival of the SS. Media it was unreasonable to delay past that date, because to do so would have jeopardized Cunard's chances of adhering to its shipping schedule. On the evidence, it appears that Local 791 would have been willing to load the SS. Port Melbourne and the SS. Sibley Park with eight men in the hold starting August 22, 1947, and that the work could have been completed and the ships removed by the time the SS. Media arrived on August 27, 1947. For this reason the claims for rerouting the SS. Media cannot be allowed, nor can the claims incident to meat which had spoiled before loading on the SS. Port Melbourne." (25 LRRM at 2201.)

The case of *Nederlandsch Amer. S.M. v. Stevedores' and L.B. Soc.*, 265 F. 397 (D.C. E.D. La.), which was relied on above, also involved an attempt to recover for breach of a collective bargaining agreement. The members of the defendant longshoremen's union[75] there involved had declined to work for plaintiff at

[75] A union with which petitioners also have no connection.

the wages specified in a collective bargaining contract, and had struck for higher wages. The plaintiff sought damages based on demurrage which accrued while its ship lay unloaded because of the strike. The court stated:

> "This brings up the question of damages. Undoubtedly the ship was delayed and demurrage accrued; but this might have been avoided by paying the extra wages demanded. The recovery should be confined to what it would have cost for additional wages to unload the ship at the rate demanded." (265 F. 397, at 400.)

In the Court of Appeals respondent claimed that had it acceded to the request of Local M-271 to assign the barge-loading work to longshoremen represented by Local 16, it would not only have been violating its agreement with Local M-271, but would have been violating the law as well. Respondent thus makes the startling assertion that it would have been violating the Act had it settled the entire dispute here in a manner specifically provided for in the Act. The very terms of Section 10(k) contemplate the voluntary adjustment of jurisdictional disputes by the parties themselves.

Furthermore, respondent admitted that when Local M-271 asked it to assign the work to the longshoremen, in accordance with the agreement between the two Locals, Local M-271 was asking that its agreement with respondent be modified to that extent. (R. 309.) We know of no principle of contract law, nor did

respondent point one out, which would subject one contracting party to an action for breach of contract for assenting to the modification of a contract at the request of the other party.

Finally, by assigning the barge-loading work to the longshoremen at the request of Local M-271, the respondent would no more have violated Section 8(a)(3) of the Labor Relations Act than it did when it deprived the longshoremen in October, 1947, of work they had been doing for respondent to that time. (R. 216-218, 232.) In neither instance could it be demonstrated that the assignment was motivated by the union affiliation or lack of affiliation of the workers involved, which is essential to a violation of Section 8(a)(3).

The Court of Appeals upheld the refusal of the trial court to give the instructions in question on the ground that the respondent had no duty to bargain with petitioners in an effort to reach a settlement of the dispute. (R. 1140.) Assuming, without conceding, that no such duty existed, such a position ignores completely the fact that Local M-271, the conceded exclusive bargaining representative for respondent's mill employees, joined with Local 16 in the request that the barge-loading work be assigned to the longshoremen. The respondent unquestionably was under a duty to bargain with Local M-271 on the matter. Instead, as has been demonstrated from the record, it flatly refused to comply with or bargain concerning Local M-271's reasonable request. The jurisdictional

dispute of which respondent complains is thus clearly one of its own making.[78] It was only through respondent's efforts that Local M-271 was later persuaded to disagree with Local 16 on the assignment of the work. (R. 453, 534-536.)

In the light of the foregoing authorities, as well as the uncontradicted evidence in the record that respondent itself created the jurisdictional dispute here involved, it is clear that the jury was entitled to consider the issues included in petitioner's requested instructions numbers 1, 2, 12 and 13. Had it done so, its verdict might have been for petitioners, or for a lesser amount. The error of the trial court in refusing to tender these issues to the jury prejudiced petitioners, and requires a reversal of its judgment.

CONCLUSION.

For the reasons stated, it is plain that the trial court committed fundamental errors in its conception of the nature of conduct which is actionable under Sec. 303(a)(4) of the Act, in its ruling that it was a district court of the United States within the meaning of Sec. 303(b) of the Act, and in its conduct of the trial. Accordingly, it is respectfully submitted

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[78] That the Regional Director for the Nineteenth Region of the Board, and the Acting General Counsel of the Board, took this view of the situation, is demonstrated by their dismissal of the first Sec. 8(b)(4)(D) charge filed by respondent, at a time when both Local M-271 and Local 16 were jointly requesting that the barge-loading work be assigned to the longshoremen.

that the judgment of the Court of Appeals, upholding that of the trial court, should be reversed and remanded, with directions that the judgment of the trial court be vacated.

Dated, San Francisco, California,
November 14, 1951.

RICHARD GLADSTEIN,
Counsel for Petitioners.

GLADSTEIN, ANDERSEN & LEONARD,
NORMAN LEONARD,
ALLAN BROTSKY,
Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

Instructions Nos. 1, 2, 12 and 13, offered by petitioners and refused, read as follows:

"1. You are instructed that it is the public policy of the United States that—

"Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

"It is the purpose and policy of the Labor Management Relations Act of 1947, oftentimes called the 'Taft-Hartley Act', in order to promote the full flow of commerce, to prescribe legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." (R. 34-35.)

"2. The Taft-Hartley Act was enacted in the interests of public policy to avoid economic strife and warfare, and so if you find from a consideration of all the evidence in this case that the action of the Juneau Spruce Corporation in refusing to accede to the demand of IWA M-271 to turn over the loading of barges to Local 16 was unreasonable or unjustifiable, in view of that provision, plaintiff is not entitled to recover any damage it may have sustained on account of such unreasonable or unjustifiable refusal to bargain.

"This policy is applicable only to the territorial limits of the United States and not to Canada." (R. 35-36.)

"12. You are instructed that section 201 of the Taft-Hartley Act provides as follows:

"That it is the policy of the United States that:

"'(a) Sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of the employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

"'(b) The settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage em-

ployers and representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for settlement of disputes; and

"'(c) Certain controversies which arise between parties to collective bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreement provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.'" (R. 43-44.)

"13. Section 204 of the Taft-Hartley Act provides as follows:

"'In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes employers and employees and their representatives, in any industry affecting commerce, shall:

"'(1) Exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provisions for ad-

equate notice of any proposed change in the terms of such agreement;

"'(2) Whenever a dispute arises over the terms or application of a collective bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously;

"'(3) In case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this act for the purpose of aiding in a settlement of the dispute.'" (R. 44.)

Section 10(l) of the National Labor Relations Act, as amended, provides as follows:

"Sec. 10 * * *

"(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred,

is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to sections 8 (b) (4) (D)."

Sections 303(a)(2) and (3) of the Act provide as follows:

"Sec. 303.

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

* * * * * * *

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

"(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

* * * * * * *"